162 U S 499

162-499

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

NO. 853.

ED ALBERTY, ALIAS CHARLES BURNS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED JANUARY 13, 1896.
(16143.)

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1895.

No. 853.

ED ALBERTY, ALIAS CHARLES BURNS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

INDEX.

	Original.	Print.
Caption	1	1
Indictment	1	1
Arraignment and plea	3	2
Order for continuance	3	2
Order beginning trial	3	2
Order concluding trial	4	2
Verdict	5	3
Order filing motion for new trial	5	3
Order overruling motion for new trial	5	3
Judgment and sentence	5	3
Order allowing bill of exceptions, etc	6	4
Order filing assignment of errors, etc	7	4
Order staying execution	7	4
Bill of exceptions	8	5
Evidence for the Government	8	5
Testimony of Mrs. Willie Blanche Hensley	9	5
Mrs. Lipe	32	19
Jeff Brown	41	25
Mrs. Ann Brown	51	31
Jeff Brown (recalled)	56	35
Harry Starr	57	35
Joe Weighty	59	36
Evidence for defendant	61	37
Testimony of Ed Alberty alias Charles Burns	62	37

	Original.	Print.
Bill of exceptions—Continued.		
Evidence for defendant—Continued.		
Testimony of Thomas R. Graves	75	45
Rachael Graves	80	48
Nora Sanders	82	49
Jim Smith	87	52
Abe Davis	90	54
Jim Smith	92	55
Sank Vann	93	55
Charge of the court	97	57
Exceptions to the charge	143	81
Verdict	148	84
Judge's certificate to bill of exceptions	148	84
Assignment of errors	149	85
Petition for writ of error	156	89
Poverty affidavit	157	89
Writ of error	158	90
Citation	159	90
Clerk's certificate	161	91

a In the United States circuit court for the western district of Arkansas.

Pleas and proceedings before the Honorable Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas, holding circuit court in case of—

UNITED STATES }
vs. } Indictment for murder. No. 152.
ED ALBERTY. }

1 *Indictment.*

United States of America, western district of Arkansas, in the circuit court, Aug. term, 1895.

UNITED STATES }
vs. } Murder.
ED ALBERTY, ALIAS CHARLES BURNS. }

The grand jurors of the United States of America, duly selected, empaneled, sworn and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That Ed Alberty, alias Charles Burns, a negro and not an Indian, on the 15 day of May, A. D. 1879, at the Cherokee Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one Phil Duncan, a negro and not an Indian, then and there being, feloniously, wilfully, and of his malice aforethought did make an assault; and that the said Ed Alberty, alias Charles Burns, with a certain pistol then and there charged with gunpowder and one leaden bullet, which said pistol he the said Ed Alberty, alias Charles Burns, in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought did discharge and shoot off to, against, and upon the said Phil Duncan, and that the said Ed Alberty, alias Charles Burnes, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there by force of the gunpowder aforesaid, by the said Ed Alberty, alias Charles Burns, discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound him the said Phil Duncan in and upon the body of him the said Phil Duncan, giving to him the said Phil Duncan then and there with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid by the

2 said Ed Alberty, alias Charles Burns, in and upon the body of him the said Phil Duncan one mortal wound of the depth of four inches and of the breadth of half an inch; of which said mortal wound he the said Phil Duncan then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Ed Alberty, alias Charles Burns, him the said Phil Duncan in the manner and by the means aforesaid feloniously, wilfully, and of his malice aforethought did kill and murder contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

JAS. F. READ,
United States Attorney, Western District of Arkansas.

(Endorsed on back:) No. 152. United States v. Ed Alberty, alias Charles Burns. Murder. A true bill. E. J. Black, foreman. Witnesses: Mrs. Ann Hensley, Mrs. Belle Lipe, Mandy Nevins, Sam. Hidman, R. L. Benge, Harry Starr, Jeff. Brown, Ann Brown, Henry Nave, Jane Nave, Joe Waitie, Fort Gibson, I. T.; Geo. Lawson, I. M. Dodge, Fort Smith, Ark. Filed in open court Aug. 26, 1895. S. Wheeler, clerk. By I. M. Dodge, D. C.

3 *Record entries.*

In the circuit court of the United States for the western district of Arkansas, Aug. term, 1895, Monday morning, 8½ o'clock, Aug. 26, 1895.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES *vs.* ED ALBERTY, ALIAS CHARLES BURNS.	Indictment for murder. No. 152.

On this day come the United States of America by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorney, and having had hearing of said indictment and it being demanded of him concerning said indictment above specified and charged upon him how he would acquit himself thereof he says he is not guilty as charged in said indictment, and puts himself upon the country.

(Caption omitted.)

Ordered by the court that this cause be and the same is hereby continued to the November term, 1895, of this court, and set down for trial Nov. 12, 1895.

NOV. TERM, 1895, *Wednesday, Nov. 13, 1895.*

(Caption omitted.)

On this day come the United States of America by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Messrs. Barnes & Mellette, and it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause, and a full and complete list of the witnesses in this cause, and that he has also been served with a full and complete list of the panel of petit jurors and alternates as selected and drawn by the jury commissioners for the present term of this court more than two entire days heretofore; and having heretofore had hearing of said indictment and pleaded not guilty thereto it is, on motion of the plaintiff by its attorney,

4 ordered by the court that a jury come to try the issue joined.

Whereupon, after counsel for both plaintiff and defendant had exercised in the presence of the defendant their full right of challenge under the law, the following jurors were selected for the trial of this cause, to wit: Robt. R. Scott, Francis M. Turner, Noah A. Tinker, Pleas.

L. Bohlen, Gus. T. Culbertson, Robt. G. Curtis, Ambrose Clark, Rhoden C. Horner, Jesse N. Jones, Geo. W. Jones, W. F. Jones, John D. McClary, twelve good and qualified electors of the western district of Arkansas, duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence, and after hearing a portion of the evidence and there not being time to further progress in the trial of this cause they were put in charge of a sworn bailiff of this court. And it is further ordered by the court that said jury be kept together and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

THURSDAY, *Nov. 14, 1895.*

(Caption omitted.)

On this day come the United States of America by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Messrs. Barnes & Mellette; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit: Robt. R. Scott, Francis M. Turner, Noah A. Tinker, Pleas. L. Bohlen, Gus. T. Culbertson, Robt. G. Curtis, Ambrose Clark, Rhoden C. Horner, Jesse N. Jones, Geo. W. Jones, Wm. F. Jones, John D. McClary, who took their seats in the jury box, and after hearing the remainder of the evidence received the charge of the court, to which charge counsel for defendant filed exceptions.

Whereupon said jury retired, in charge of the sworn bailiff aforesaid, to consider of their verdict.

5 FRIDAY, *Nov. 15, 1895.*

(Caption omitted.)

On this day come the United States of America by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, Messrs. Barnes & Mellette; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit: Robt. R. Scott, Francis M. Turner, Noah A. Tinker, Pleas. L. Bohlen, Gus. T. Culbertson, Robt. G. Curtis, Ambrose Clark, Rhoden C. Horner, Jesse N. Jones, Geo. W. Jones, Wm. F. Jones, John D. McClary, who returned into court the following verdict, to wit: "We, the jury, find the defendant, Ed Alberty, alias Chas. Burns, guilty of murder as charged in the within indictment."

(Signed) J. N. JONES, *Foreman.*

Whereupon, by order of the court, the jury was discharged from the further consideration of the case and the said defendant was remanded to the custody of the marshal to await final sentence.

TUESDAY, *Nov. 19, 1895.*

(Caption omitted.)

On this day come the said defendant by his attorney and files his motion to set aside the verdict of the jury and for a new trial in this cause.

WEDNESDAY, *Dec. 4, 1895.*

(Caption omitted.)

On this day come on to be heard the motion heretofore filed to set aside the verdict of the jury and for a new trial in this cause, and the court being fully advised in the premises doth overrule said motion.

(Caption omitted.)

On motion of Jas. F. Read, esq., attorney for the western district of Arkansas, *of* the said defendant, Ed Alberty, alias Charles Burns, was brought to the bar of the court in custody of the marshal of said district, and it
6 being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty heretofore returned against him by the jury in this cause on the 15th of Nov., 1895, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said. Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court that the said Ed Alberty, alias Charles Burns, be deemed, taken, and adjudged guilty of the crime of murder, and it is ordered by the court that the said marshal of the district aforesaid cause the said Ed Alberty, alias Charles Burns, to be taken hence, and him, the said Ed Alberty, alias Charles Burns, safely and securely keep, from the date hereof until Wednesday, the 29th day of January, A. D. 1896, and on that day and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said Ed Alberty, alias Charles Burns, to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon on Wednesday, the said 29th day of January, in the year of our Lord one thousand eight hundred and ninety-six, cause the said Ed Alberty, alias Charles Burns, to be hanged by the neck until he is dead.

And it is further considered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended, and that they have execution therefor.

And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal with a full and true account of the execution of the same.

MONDAY, *Dec. 9, 1895.*

(Caption omitted.)

Comes the defendant by his attorney and tenders his bill of exceptions and asks that the same be signed and made a part of the record in
7 this cause, which is accordingly done. At the same time comes Jas. F. Read, esq., U. S. attorney, and objects to the bill of exceptions because the same contains the charge of the court in full and the evidence in full, as given at the trial, and the objection being by the court overruled, the district attorney at the time excepted to said ruling.

TUESDAY, *Dec. 10, 1895.*

(Caption omitted.)

Comes defendant by his attorney and files his assignment of errors and petition for writ of error to the Supreme Court of the United States; also, at the same time files a poverty affidavit praying for an appeal herein at the expense of the United States.

MONDAY, *Dec. 23.*

(Caption omitted.)

Now comes the clerk and makes known to the court that a writ of error taking this case to the Supreme Court of the United States has been issued.

It is therefore ordered that execution of sentence be stayed, pending action of said Supreme Court.

8 *Bill of exceptions.*

In the circuit court of the United States, western district of Arkansas.

UNITED STATES
vs. } Murder.
ED ALBERTY, ALIAS CHARLES BURNS.

Be it remembered that on the —— day of November, 1895, the same being a day of the November term, 1895, of the United States circuit court for the western district of Arkansas, came on to be heard the above-entitled cause, when the following proceedings were had, to wit:

Twelve good and lawful men were duly empaneled, sworn, and charged, to try the issues joined. And the Government, to maintain the issues upon its part, produced and examined the following-named witnesses, to wit, Mrs. Willie Blanche Hensley, Mrs. Lipe, Jeff Brown, Mrs. Ann Brown, Harry Starr, Joe Weighty, who testified, respectively, as follows, to wit:

9 NOVEMBER 13th, A. D. 1895.

Mrs. WILLIE BLANCHE HENSLEY, having been duly sworn upon behalf of the Government, was examined in chief by James F. Read, esq., the district attorney, and testified as follows, to wit:

Question. What is your name?
Answer. Willie Blanche Hensley.
Q. Have you the name also of A. M. Hensley?
A. Yes, sir; those are my husband's initials.
Q. He is alive, is he?
A. Yes, sir.
Q. Where do you live?
A. Ft. Gibson, Indian Territory.
Q. How old are you?
A. I was 34 years old the 31st day of last August.
Q. How long have you lived in the Indian Territory?
A. Seventeen years last September.
Q. What relation are you to Mrs. Lipe?
A. I am her only child.
Q. Mr. Lipe was her second husband, wasn't he?
A. Yes, sir; I am her first husband's child.
Q. What was her first husband's name?
A. Manuel.
Q. Was that his surname?
A. R. C. Manuel.

Q. You live at Ft. Gibson, you say?

A. Yes, sir.

Q. Is Mr. Lipe alive now?

A. No, sir; he is dead.

Q. How long has he been dead?

A. Two years last September—the 9th day of last September.

Q. What business was he engaged in there at the time of his death?

A. He was not engaged in any business—well, he was a merchant there at the time he married my mother, but he had retired from business; he moved his store up on Verdigris and turned it over to his son, Maje Lipe—his eldest son. He had retired. He was still a partner in the business.

Q. Did you know Ed Alberty, the defendant?

A. Yes, sir; I knew him well.

Q. Did you know Phillip Duncan?

A. No, sir; I did not.

Q. Where did you know Ed Alberty?

A. I knew him there at Ft. Gibson. He worked for my father off and on.

He is charged here with killing Phillip Duncan by shooting him with a pistol. Were you present at any time when he had a difficulty with Phillip Duncan?

A. I was present the night the shooting occurred; yes, sir.

Q. Where were you sleeping that night?

A. I was sleeping in the front room up stairs, of my mother's home.

Q. That was a two story building?

A. Yes, sir; it was.

Q. Where did your mother and step-father sleep?

A. They slept down stairs. The house was built with a little hall in between, and the parlor was on this side [illustrating], and their room on this side; on the right hand side as you went into the door was mama's room, on the left hand from the parlor you went right up the steps and entered my room right at the head of the stairs.

Q. Right over your mother's room, then?

A. No, sir; the hallway up stairs was over mama's room. My room was immediately over the parlor.

Q. Who was staying in your room with you that night, if any one?

A. Manda Alberty and her baby, Cora—this man Ed Alberty's wife.

Q. Why was she in your room?

A. I had been sick, having chills and fever, and she had been sleeping in there to attend to me.

Q. Were you aroused that night by any noise or sound?

A. Yes, sir; I had gone to bed, but I hadn't gone to sleep, and I heard some one calling Mr. Lipe—"Mr. Lipe! Mr. Lipe! here is a man I found trying to climb into your window."

Q. Did you recognize the voice?

A. Yes; well, I thought I did at the time, but I went downstairs, and after I got down stairs I found out who it was.

Q. Who was it?

A. It was Ed Alberty.

Q. Was there anyone with him?

A. Yes, sir; he had a man with him, and he says, "Mr. Lipe, here is a man I found trying to climb into your window."

Q. Did he have hold of the man?

A. No, sir. And Mr. Lipe says, "What?"—he was rather hard of hearing—and he got up and went to the door and Ed told him the second time, and Mr. Lipe says, "Get out from here"—ordered him to leave. Phil says, "Ed, you know better than that; you told me you wanted to prove something by Mandy to me," or "to Mandy by me."

Q. Who was Mandy?

A. That was Ed's wife. And then he asked my mother where Mandy was.

Q. Who did?

A. Ed did. He asked mama where was Mandy—that is, Mrs. Lipe, my mother. Mama told him she was upstairs asleep, and she says, "Willie"—that is me—"go up there and wake her up and tell her to come down here; Ed wants to see her." I went upstairs and told her to come down, that Ed wanted to see her. When I brought down-stairs, no sooner than she got to the door Ed pulled her out in the front yard and they began tussling, and she began calling. She says, "Mrs. Lipe, are you going to let him kill me?" Mrs. Lipe, are you going to let him kill me?" and it frightened me so I run out and took hold of her and told Ed to quit. I didn't know that Ed had a pistol until
12 I got hold of his hand, and I don't know how I did so, but some way in the tussle I knocked the pistol out of his hand. At that Ed let her go, and she run in the house, and upstairs. Ed walked right around and stooped, but it was on the other side of the rosebush, and I could not tell what he picked up, and it being night. Then he walked around on this side of the rosebush, *neck* to the walk, and the man was on the other side, and he said, with an oath, "I will kill you." I saw the flash, and heard the report, and heard the man say, "Ed, you have killed me," but I could not swear that Ed killed the man, because it was night, and I can't see good.

Q. But you heard the defendant say, with an oath, "I will kill you?"

A. Yes, sir; I did. And I heard Phil say, or at least the man they said was Phil—I don't know Phil—I didn't know him then.

Q. You saw the flash and heard him say, "Ed, you have killed me?"

A. Yes, sir.

Q. What did they do then?

A. After the man was shot he started around to the back gate. He got to the corner of the house and fell, and he said, "Mrs. Lipe, I tried to get out of your yard, but I couldn't."

Mr. WILLIAM M. MELLETTE (of counsel for defendant). You need not mind what he said.

The COURT. I think that is competent. That is res gestæ.

Mr. WILLIAM M. MELLETTE (of counsel for defendant). How long was that after the killing, or after the shooting you heard there, that you heard him say that?

The WITNESS. It was immediately after the shot was fired. The man started to walk out there—you see, there was a back gate out this way [illustrating], and he started to go there, and he got to the corner of the

house and fell, and he just said, "Mrs. Lipe, I tried to get out
13 of the yard and I couldn't."

Mr. WILLIAM M. MELLETTE (of counsel for defendant). Where was Alberty at that time?

The WITNESS. He had got outside of the gate, and was going to leave, and mama called him and says, "Ed, you must go and get somebody to take this man away from here."

The DISTRICT ATTORNEY. Was he taken away?

A. Yes, sir; he went and got someone to take him away.

Q. Did you see Ed Alberty anymore after that?

A. I saw him once after that.

Q. When was that?

A. The next morning.

Q. What time the next morning?

A. Well, I am not positive, but it was early in the morning. I don't remember whether—I believe it was before breakfast; I am not sure.

Q. Did you see him after that?

A. No, sir; I never did.

Q. Do you know whether he was in the town there after that or not?

A. No, sir; I don't. I heard so, but I don't know so.

Q. How long after that was it before you heard that he was in the town?

A. Tuesday morning after this man died he sent to his wife to let the children come and see him over to Rachel Gray's and tell him good-bye.

Q. Did you ever see him after that?

A. No, sir; I never did. I never saw him after Monday morning after that shooting occurred Sunday night.

Q. When was it that that shooting took place?

A. On Sunday night. It must have been about near midnight, anyway.

Q. What year was it?

A. Well, you have all got it 1879, but it was in 1880, because
14 my mama and Mr. Lipe wasn't married until in August, 1879, and this was the following spring.

Q. It was in 1880, then?

A. Yes, sir; according to my account and my mother's.

Q. Did you ever see the wounded man after that?

A. No, sir; not until after he was dead.

Q. You saw him after he was dead, did you?

A. Yes, sir.

Q. Where did you see him?

A. I saw him at the house where he died and where he was laid out. They moved him over in a little negro cabin right next to us.

Q. Whose house was it? Who was living there?

A. A man by the name of Prince Albert.

Q. What was it this man said when he was shot—"Ed, you have shot me," or what did he say?

A. He said, "Ed, you have killed me."

Q. How far was he away from Ed, do you think, at the time the shot was fired?

A. I could not exactly tell. Ed was on this side [illustrating] of the walk, and the man was right on the other side, but I am no judge of distances, and I could not tell you how far.

Q. As far apart as you and I?

A. No, sir.

Q. Not that far apart?

A. No, sir; just about as far as from me to this gentleman here.

The COURT. That is about 8 feet.

The WITNESS. Only Ed was kind of this way [illustrating], and Phil was kind of this way [illustrating].

The DISTRICT ATTORNEY. Kind of catacornered?

A. Yes, sir; right angling across. Ed was a little higher up on this side than the other man was on the other side.

Q. Did you hear the other man make any threats towards Ed there that night?

A. No, sir; I did not.

15 Q. Did he say anything except that Ed had brought him there?

A. He didn't say anything only, "Ed, you know better; you told me you wanted to prove something to me" either "by Mandy" or "to Mandy."

Q. That was when Ed was saying that he had caught him getting in the window?

A. Yes, sir.

Q. Did you see the man who was killed make any attempt to strike Ed, or do anything to him?

A. I did not.

Cross-examination by Mr. WILLIAM M. MELLETTE:

Q. Was Ed Alberty working for your stepfather at that time?

A. Yes, sir; he had been for a few days.

Q. What was he doing?

A. He was tending the garden, and attending to our buggy team, and doing the chores around the house.

Q. Had he been in the habit of staying there any time at nights?

A. No, sir.

Q. Where did he live at that time; do you know?

A. No, sir; I could not tell you where he staid.

Q. Do you know where a colored man by the name of Graves lived?

A. Yes, sir.

Q. Do you know whether Ed lived there at his house or not?

A. No, sir; I don't.

Q. You don't know about that?

A. No, sir.

Q. Did you know of notes passing between Phillip and Mandy—between this man who was killed and the defendant's wife?

A. No, sir.

Q. You had never seen any?

A. No, sir.

Q. You had never seen him there so far as——

16 A. No, sir; I never saw Phil Duncan at all until that night.

Q. You never saw him any place?

A. Yes, sir; not to my knowledge, and it was dark that night.

Q. How long had Mandy been working for you?

A. She had been working for us since some time in February.

Q. What time did this killing take place?

A. In the month of May; I don't know the exact date, but it was in the month of May.

Q. How long had she been sleeping in the room with you?

A. Well, she had been sleeping in the room with me at least a week, if not more.

Q. Where did she sleep before she slept in the room with you?

A. She slept in one of the rooms in the back hall—that opened off the back hall.

Q. Was that in the main building or not?

A. Yes, sir; it was all a main building, except there was a little summerhouse upstairs. There was a porch downstairs that divided the dining room and kitchen from the front part, and there was a little summerhouse upstairs.

Q. How many children had she been keeping there with her?

A. Only one.

Q. How old was that?

A. I don't know. It was just a little baby, though; it could not walk.

Q. Where were the other children?

A. They staid over at Aunt Rachel Gray's.

Q. Gray's or Graves?

A. Gray's, I suppose.

Q. Is it the colored woman who is here?

A. Yes, sir.

Q. Her name is Graves, is it not?

A. I always heard it called Gray; it may be Graves; I don't know.

Q. That is where Alberty staid, is it not?

17 A. I don't know where Alberty staid.

Q. Did he have the children over there? Was he taking care of them over there?

A. No, sir; he didn't take care of them. Mandy took care of the children, and she got Aunt Rachel to keep them so she could hire to us. And lots of times my mother gave her food to send to the children.

Q. If Ed Alberty was living there at Graves, then you don't know anything about it?

A. No, sir; I don't. I don't know where he lived.

Q. What time of night, now, do you think this occurred?

A. I could not tell exactly, but it must have been near midnight, because I know we didn't go to bed until after 10 o'clock, and this was some little time after we had gone to bed. I hadn't been to sleep.

Q. Had Mandy been to church that night?

A. Yes, sir; she went to church and came home rather early.

Q. Who came home with her?

A. No one that I saw.

Q. I will ask you if the defendant, Ed Alberty, didn't come home with her?

A. If he did, I did not see him. He may have—if he did he come to the gate and didn't come any further. He didn't come in the house, anyway. He didn't come where I saw him.

Q. Was she 'sleep at the time that this occurred?

A. Yes, sir.

Q. Were you confined to your bed—of course you were not; you got up that night.

A. Yes, sir; I had been confined to my bed, but I was getting better, I had been having chills.

Q. What time did you retire that night?

A. Well, I don't remember.

Q. You state you hadn't gone to sleep when this thing occurred?

A. No, sir; I hadn't been to sleep; and I am not positive when I went to bed, but it was sometime near 10 o'clock.

18 Q. Was it customary for you to lie awake a long time or a short time after you went to bed?

A. Well, sometimes I laid awake quite awhile, and sometimes I didn't. It was owing to how I felt, I suppose. But, having fever, I was restless. I had been having fever, and that night I was restless.

Q. Your opinion—it is simply an opinion of yours when you say it was about midnight; you have really no means of knowing that have you?

A. No, sir; I don't know what time it was; I could not say; I would not do it because I could not——

Q. Had Mandy come home from church at the time you went to bed?

A. She had been home from church a good while before I went to bed. She was in bed asleep when I went to bed, because I went upstairs for something after my mother came home from church and she was ready to go to bed then, and I went back downstairs and talked to mam'a and papa quite awhile after that.

Q. Had Ed Alberty, the defendant, been at your house that Sunday?

A. Yes, sir.

Q. Did he take his meals there, or his dinners?

A. I don't know whether he took his dinner there that day or not, but he never ate there unless he was working there.

Q. If he was working there, did he generally take his meals there?

A. Yes, sir; what days he worked there he ate there.

Q. You say he had been working there at the time this occurred, four or five days?

A. Yes; I don't know how long; I would not say positively how long he had been working there when this occurred.

Q. You have no recollection as to just what he did that day, whether he took supper, dinner, or breakfast, or any of them?

A. No, sir; he didn't take supper there, I know, and I don't 19 know about breakfast or dinner. I know he was there in the afternoon of that day. I saw him in the afternoon, and that is all I am positive about.

Q. What was he doing there?

A. He come there to talk to his wife, I suppose.

Q. How is that?

A. He was talking to his wife when I saw him.

Q. I suppose if he worked there he was about the house considerably, wasn't he?

A. Well, he was when he worked there; yes, sir.

Q. He talked to her frequently, didn't he, all the time whenever he would be in her presence?

A. Yes, sir; he would talk to her.

Q. When they would be frequently together?

A. Yes, sir.

Q. They were on speaking terms, of course?

A. Yes, sir; they were on friendly terms. He come to see the baby, and would play with that whenever he wanted to.

Q. The first thing you heard was somebody come to the door, knock, and call Mr. Lipe?

A. I never heard anybody knock.

Q. You didn't hear anybody knock?

A. No, sir.

Q. What did you hear?

A. The first thing I heard was somebody calling my stepfather.

Q. You do not think you stated awhile ago that the first thing you heard was somebody knock?

A. I know I didn't say that somebody knocked. I don't think anything about it. I know it.

Q. I have it down that way. I am mistaken.

A. I didn't hear anybody knock. I heard someone calling, I said. Someone calling Mr. Lipe.

Q. What did you do when you heard the calling?

A. I got up and went down stairs to see who it was and what was the matter.

Q. How did you happen to get up? I mean, why did you get up?

A. I told you I got up to go to see what was the matter, to see who it was.

20 Q. Did you get up before Mr. Lipe did?

A. No, sir; I didn't. Mr. Lipe was up and opening the door when I went downstairs.

Q. Opening the door?

A. Yes, sir.

Q. What did you see when you got down there? Where did you go? Outside, or did you stay inside?

A. When I first went down there I staid inside until mama told me to go and tell Mandy to come down.

Q. You staid inside of the house?

A. Yes, sir; until Mandy——

Q. Until your mother told you to go and tell Mandy to come down? That is what you mean, is it?

A. Yes, sir.

Q. You could not see the parties on the outside at that time, could you?

A. Well, when I went upstairs I could not see anyone upstairs——

Q. I know; but when you were down standing inside of the house and looking out, could you see anybody?

The DISTRICT ATTORNEY. When you first went down?

The WITNESS. No, sir; I could not see anybody until Mr. Lipe opened the front door.

Mr. WILLIAM M. MELLETTE (of counsel for defendant). Could you see anybody then after he opened the door?

A. Yes, sir; I saw Ed come to the door and tell mama that he wanted to see Mandy.

Q. That wasn't the first thing that occurred, was it?

A. No, sir; that wasn't the first thing that occurred.

Q. Was your eyesight bad at that time?

A. Not like it is now; no, sir.

Q. Still, you were suffering at that time? You could not see well at that time, could you?

A. Well, I never have been able to see well, but then I could see good enough that I didn't use glasses.

Q. What do you mean by that? Could you recognize people?

A. Yes, sir; I could at that time, if they were not too great a
21 distance from me. I could see a great deal better—I can't see without glasses now, and then I didn't use glasses. But I never could see well.

Q. You never could see well. I just simply wanted to find out what your facilities were for seeing on that night. Now, did Mr. Lipe make a light in the room before he opened the door?

A. No, sir; the moon was shining bright.

Q. Are you certain of that?

A. Yes, sir; I am certain that it was a moonlight night.

Q. As a matter of fact, are you not mistaken about that? Wasn't it starlight?

A. No, sir; it wasn't starlight; it was moonlight.

Q. Do you know what the day of the month was?

A. No, sir; I don't.

Q. You do not?

A. No, sir; I don't remember what day of the month it was.

Q. You say it was in May?

A. Yes, sir.

Q. But you can not remember the day of the month?

A. No, sir.

Q. You came down stairs and stood in the hall and looked out, and you could not recognize Alberty—you could not recognize him by looking at him at that time, could you? You could not see him well enough out of the door to recognize him?

A. I knew it was him by his voice; if I had never seen him I would have known it was him.

Q. That is what I want to know, whether you recognized him by his voice or by seeing him?

A. When I first went down before I saw him, why, of course, I recognized him by his voice, but I saw him afterwards.

Q. You saw him come to the door. Was there a porch to the house?

A. Yes, sir; there was a porch to the house.

Q. You saw nobody else at that time, did you, out there?

A. When Mr. Lipe opened the door, as I was passing, Ed
22 says, "Here is this man," and I could see the other man out there as I went into mama's room.

Q. You could not distinguish his features?

A. No, sir.

Q. You could not tell who he was or how he looked?

A. No, sir.

Q. Whether he was a white man or a black man?

A. No, sir; I could not at that time, but I did afterwards.

Q. Was it dark on the porch or light on the porch? Did the moonlight shine on the porch?

A. No, sir.

Q. Where was the man standing that you said you could see out there then?

A. He was standing on the other side of the walk, close to where he was standing when he was shot.

Q. How far from the house?

A. Oh, I could not tell you how far. I am no judge of distances.

Q. About how far from the door was he standing?

A. Well, I could not even tell that.

Q. As far as from here to the back end of the house?

A. Oh, no.

Q. As far as from here to the wall over there?

A. I suppose it was about as far as from me to Mr. Read [indicating a distance of about 12 feet], but I won't be certain, for I am no judge of distance, but I know we had a portico in front of the house, and we stepped right off the portico on the walk, and this man was between the gate and the walk, and it is not far to the front gate.

Q. Between the gate and the walk?

A. Between the gate and the house, I should have said.

Q. Did the walk run directly from the door to the gate?

A. Yes, sir; right straight.

Q. Then he could not have been between the walk——

A. I said between the porch.

Q. Between the porch and what?

A. And the front gate.

23 Q. On which side of the walk was he?

A. He was on the right-hand side as you would go to the house from the house to the gate, but it would throw it on the left hand as you would go from the gate to the house.

Q. Was there anything between him and where you were?

A. No, sir.

Q. No shrubbery of any kind?

A. No, sir.

Q. No, bushes, vines, or trees, or anything like that?

A. No, sir.

Q. The yard had nothing of that kind in it?

A. Yes; it did.

Q. Where were the bushes, vines, trees, and shrubbery?

A. They were scattered all over the yard, but he didn't happen to be where there was any between him and me. If I was there I could show you the exact position.

Q. You say your eyes were affected at that time, and you never have had good eyesight; therefore you could form very little idea at that time as to how far the man was from the house, could you?

A. I told you once I was no judge of distance, because I could not tell, but it could not be far, because our walk is so short from the house

to the gate. But I am no judge of distance. I don't know anything about feet.

The DISTRICT ATTORNEY. Very few people are judges of distance, Mrs. Hensley.

The WITNESS. Well, I am not.

Mr. WILLIAM M. MELLETTE (of counsel for defendant). Is it not a fact that you judge, and have always judged, these distance' more by your hearing than you have by sight?

A. No, sir; when you see anything, you see it, don't you?

Q. I know.

A. Well, I do, too.

Q. I know that, but you say your eyesight was bad at that time.

A. Well, even if my eyesight was bad, that didn't hinder me
24 from seeing anything. I wasn't blind.

Q. I know that. You were not blind——

A. I told you I saw it, and if I hadn't seen it I would not have said so.

Q. I want to know how well you saw it, or how near you could come to being positive as to what you saw there. That is why I am asking you these questions. Of course it is no pleasure to me to ask you in regard to your eyesight and things of that kind, but I want to know whether you could see well at that time or not.

A. I saw the man standing there, as I told you, but I could not see to tell who it was, or didn't know who it was until afterwards.

Q. Were both of your eyes affected at that time?

A. Well, my eyes have both been affected always, as far as that is concerned.

Q. How is that?

A. I had sore eyes when I was three days old, and that affected my eyes, both of them, but they never grew weaker until after I was married. My sight wasn't bad until after I was married, rather.

Q. What do you mean by that?

A. I said my sight was not so bad until after I was married.

Q. Your sight wasn't so bad until after you were married?

A. No, sir.

Q. Although you do not claim at this time to have had good eyesight?

A. No, sir; I don't. Didn't I tell you that it being night, and me not having good sight, that I could not swear it?

Q. What is that you told me you could not swear?

A. I told you that I saw the flash and heard the report, and heard Ed say, with an oath, "I will kill you," and heard Phil say, "Ed, you have killed me," but it being night, and I could not see good, I could not swear that Ed killed Phil Duncan.

25 Q. You didn't see the parties at that time?

A. Yes; I saw them, but then I could not see the pistol; I could not see the bullet leave the pistol and go into him.

Q. You say Duncan was standing in the same place all the time?

A. Well, near about the same place; I don't know.

Q. Now, near about? I want to know whether he was standing exactly in the same place or not?

A. I don't know.

Q. You don't know?

A. No; I don't.

Q. You saw him both times; why can't you tell whether he was in the same place or not?

A. Because I don't know whether he moved or not. He might have moved when I went upstairs to call Mandy, for all I know.

Q. He might have moved, but give your idea as to whether he was in the same place or not; give your judgment.

The DISTRICT ATTORNEY. She has done that.

The WITNESS. I don't know, I told you.

Mr. WILLIAM M. MELLETTE (of counsel for defendant). You know whether he appeared to be in the same place, or whether he appeared to have moved when you came back, I suppose?

A. Well, no; I don't.

Q. I will ask you, as a matter of fact, if it was not Duncan who said "I will kill you," instead of Ed Alberty?

A. No, sir; it was Ed Alberty said, with an oath, "I will kill you."

The COURT. Just say what he said; repeat the oath that he used. Did he use the deceased's name when he said "I will kill you?"

The WITNESS. No, sir; he just said "I will be damned," or "I will kill you, damn you." That was the words.

Mr. WILLIAM M. MELLETTE (of counsel for defendant). I will ask you if it was not Duncan who said that?

A. No, sir; it was not Duncan.

Q. Give me a chance. I want to talk to you about it. You
26 need not get mad about it.

A. I am not mad a particle.

Q. You seem to have a little malice against Ed?

A. No; I have not a bit of malice against him.

Q. Where is Ed's wife now?

A. She is at Tahlequah, I believe; the woman who was his wife.

Q. Where were you standing when the shot was fired?

A. I was standing on the walk.

Q. Whereabouts?

A. In front of the house.

Q. How far from the porch?

A. Well, I could not tell you exactly the number of feet, but it wasn't very far.

Q. About ten feet?

A. I told you that I am no judge of the number of feet. I could not tell you whether it was ten feet or the number of feet.

Q. Was it halfway from the house, then, to the gate?

A. No, sir.

Q. A third of the way?

A. Well, I don't know.

Q. How far from the walk was it that the shooting took place?

A. One was on one side of the walk, and the other was on the other side, right up close to the edge of the walk.

Q. One was on one side of the walk; how far were they from you then?

A. Ed could not have been—; well, as I tell you again, I am no judge of feet, but Ed was not very far from me, and Phil was still further.

Q. Where was your mother at that time?

A. Standing on the porch, I think.

Q. Do you know where she was?

A. Didn't I just tell you?

Q. You said you thought she was there; I say do you know where she was?

A. She was standing on the porch; her and Mr. Lipe, both.

Q. At the time the shooting occurred?

A. Yes, sir.

27 Q. How do you know she was?

A. When I turned to go in the house she was there.

Q. When you turned to go in the house she was there?

A. When the shot was fired it frightened me, and I immediately turned to go in the house.

Q. Now, you said something awhile ago about Mandy coming down there and there being a tussle between Ed and her?

A. Yes, sir.

Q. Just explain how that was.

A. Well, I explained it. I don't know how you want me to explain it any more fully than I did. I told you just how it was.

The DISTRICT ATTORNEY. Tell it over again, if they want it.

The WITNESS. I said when Mandy come to the front door, Ed come and took hold of her and pulled her out there in the yard. They began tussling, and Mandy began calling, "Are you going to let him kill me, Mrs. Lipe? Mrs. Lipe, are you going to let him kill me?" and it frightened me so I, of course, run up to try to get them to quit, and when I took hold of—in catching hold of them I got hold of Ed's hand, and I didn't know that Ed had a pistol until I took hold of his hand. When I took hold of his hand I got hold of the pistol, and in tussling that way around and around, Ed kept saying, "Let go, Miss Willie; let go," and I said, "I won't until you let her go," and someway I knocked the pistol out of his hand. I don't know how I did it, but it was did.

Mr. WILLIAM M. NELLETTE (of counsel for defendant). Where was that, now?

A. Out in the front yard.

Q. Which side of the walk?

A. On this side—the left-hand side as you go from the house to the gate, or the right-hand as you go from the gate to the house.

28 Q. How far from the walk was you at that time?

A. I can't tell you the number of feet. We were not very far, though. The yard is not very large. It was a small yard.

Q. You, of course, could not see the pistol when it dropped, could you?

A. It didn't drop. In the tussle someway in knocking it it went over, kind of.

Q. You could not see it, could you?

A. I saw it when it left his hand. I didn't see it when it fell.

Q. You don't know where it fell?

A. No, sir; it fell over behind a rosebush where I could not see it.

Q. How do you know it fell over there?

A. I heard it fall, is all the way I know. I didn't see it fall. I told you I didn't see it fall.

Q. You didn't see it in his hand. All the way you know it was in his hand was you got hold of it?

A. I saw it in his hand when I got hold of it. How could I help seeing it when I had hold of his hand.

Q. You saw it when you got hold of it?

A. Yes, sir.

Q. Did you get hold of the pistol?

A. I only had my hand on it, in having hold of his hand.

Q. Now, where was Mr. Lipe at that time?

A. He was on the porch, too. We were all standing there on the porch when Mandy commenced to hollo, "You going to let him kill me; going to let him kill me?" and I could not stand it, and I rushed out to help her.

Q. You are certain you left the other two—that is, your mother and father—on the porch?

A. Yes, sir; I am certain I left them on the porch.

Q. And they were standing there when it occurred?

A. I didn't say they were standing there when it occurred. They were standing there when I left the porch, and they were standing there when I went in on the porch again. That I am positive of. I don't tell anything only what I know. That is all I am telling. I am sorry I had to tell you that.

29

Q. How far was it from where Duncan was shot to where he fell?

A. Well, I have told you several times that I am no judge of distance, but he fell over—when he was shot he was across the walk, and he turned and walked to the corner of the house and fell right in front of the parlor window at the far corner of the house, the front window.

Q. Who came there and got him?

A. I could not tell you.

Q. You don't know anything about that?

A. No, sir; I was upstairs when they come and got him.

Q. He walked from where he was to the corner of the house, you say, before he fell?

A. Yes, sir.

Q. Were you down there when they came after him?

A. No, sir; I told you I had gone upstairs when they moved him away.

Q. When was it you saw the defendant next?

A. I never saw Ed any more until the next morning.

Q. Where was he the next morning?

A. He was at our house.

Q. Then you didn't see him any more?

A. No, sir; I never saw him any more after he was at our house that Monday morning. That Monday morning was after the shooting occurred Sunday night. I never saw him since, to my knowledge.

Q. You speak of your mother calling to Alberty after he went out at the gate. Did he come back?

A. Yes, sir; he come back.

Q. Where did he come to?

A. He come in the yard, and went to get somebody to take him out.

Q. You don't know, of course, whether he went. All you know is somebody came?

30 A. I know he went out; I don't know where he went. He must have told some one, for there was nobody else there to go and tell anyone.

Q. There was just one shot fired?

A. Just the one shot.

Q. How far do you live from Grand River? How far was your house from the river?

A. It was the last house on that side next to the river.

Q. Is it standing yet?

A. The house that was there at that time has been burned, but there is another one put on the same ground.

Q. Who lives in that?

A. My mother.

Q. That is several hundred yards from the river, is it not?

A. I don't know. I won't say whether it is one hundred or several, because I don't know.

Q. You don't know?

A. No, sir. It is not very far; I know that. I can see it very plainly. That is a great deal further than Phil was from me.

Redirect examination by the DISTRICT ATTORNEY:

Q. You spoke about your eyesight at that time. I would like to get a definite idea from you—you say you could see without glasses?

A. Yes, sir; I didn't use glasses.

Q. Could you recognize an acquaintance across the street?

A. Well, no; not as far as, to say, one side of the street here clear across to the other side. I could not see that far and recognize anyone only to tell a white person from a black person.

Q. You could see persons across there?

31 A. Yes, sir; I could tell whether they were white or black, or men or women, but not well enough to distinguish who they were at that time.

Q. But in looking across a street the usual distance you could tell whether it was a man or a woman, or a white person or a black person?

A. Yes; I could at that time, but I can't now.

Recross-examination by Mr. WILLIAM M. MELLETTE:

Q. That street there is about 60 feet wide, is it not?

A. I don't know how wide it is. I told you I was no judge of distance, because I never measured anything by the number of feet. I don't know anything about it.

Witness excused.

32 Mrs. LIPE, having been duly sworn upon behalf of the Government, was examined in chief by James F. Read, esq., the district attorney, and testified as follows, to wit:

Question. Do you know how your house faces there? Does it face east and west, or how?

Answer. It faces northeast.

Q. The old house—did that face the same way? Your house has been burned since this killing took place, has it not?

A. Yes, sir.

Q. Did the old house face the same way that the new one does now?

A. Yes, sir.

Q. Is there a street in front of the house?

A. Yes, sir.

Q. How did that street run? From north to east, or how?

A. I would say that it runs east and west. I could not say positively. The house faces northeast, and the street runs right along in front of it.

Q. The house faces the street?

A. Yes, sir.

Q. It was a two-story house with a hall in between, was it not?

A. Yes, sir; there was a small hall in between the house.

Q. Rooms on either side of the hall?

A. Yes, sir.

Q. How many rooms were there down stairs?

A. There were four rooms down stairs. We had a parlor and a bedroom in the front part of the house.

Q. And then the two bedrooms back of that?

A. No, sir; dining room and kitchen.

Q. Where was the kitchen? Back of the parlor?

A. No, sir; it was back of the dining room. The dining room was back of the bedroom. The house was in shape of an ell.

Q. How far was the yard fence from the street?

33 A. The yard fence borders on the street.

Q. Was the gate right in front of the hall, or right in front of the house?

A. Yes, sir; directly in front.

Q. And you had a portico in front of the house, didn't you?

A. Yes, sir.

Q. And a walk running from the portico to the gate?

A. Yes, sir; direct.

[A plat of the house and surroundings of the scene of the homicide was shown to the witness by the district attorney, explained by her, and shown to the jury.]

Q. Where was you the night that Ed Alberty is said to have shot Phil Duncan?

A. I was at home in bed.

Q. What aroused you that night?

A. Ed came to the window and called my husband, Mr. Lipe—came to the portico, rather; the portico is not far from the window. I was next to the window in bed and I heard him.

Q. What did you do? Please tell what you heard there and saw?

A. He called Mr. Lipe and said that he wanted to see him, and I asked him what he wanted, and as well as I remember he said that he had found a man trying to get into our house and he had brought him there; that he wanted to see Mr. Lipe about it.

Q. What did Mr. Lipe say?

A. I think he said, "Oh, I reckon not; hardly." Ed said he was, and Mr. Lipe swore a little, and told him to get away from there.

Q. Had you gotten up at that time?

A. Yes, sir; we were both up at the time the conversation was going on?

Q. That is what I want to know. When he came there and called Mr. Lipe——

A. Mr. Lipe was asleep then.

34 Q. When did you get up?

A. I got up instantly when he called Mr. Lipe and wanted to know what he wanted.

Q. Where did you go?

A. I went out to the hall door; I didn't go out on the porch. I asked him what he wanted.

Q. How long after that was it before Mr. Lipe came out there?

A. He heard my voice and got up and wanted to know what the trouble was—what was the matter.

Q. Did he come out, too?

A. Yes, sir.

Q. Who did you see when you went out there?

A. I saw two colored men; Ed was one of them; I didn't know the other one.

Q. Where was the other man standing?

A. He was standing to the left of Ed a little.

Q. Did Ed have ahold of him?

A. He had him by the arm.

Q. What occurred now when you got out there?

A. When I got out there——

Q. What did Mr. Lipe do or say when he got out there?

A. Mr. Lipe told them to go away and wait until morning, and then Ed said he wanted to prove something by Mandy—that was his wife—and she was called downstairs, and when she come downstairs they had a little scuffle.

Q. Mandy and Ed?

A. Yes, sir; Mandy and Ed. Mandy got away and went back upstairs, and then when she went back upstairs my husband told me to go in the house, and I told him I wanted him to go first. I don't remember very much of the conversation that passed because it has been a long while ago.

Q. Where was your daughter?

A. She was out on the porch, and about somewhere; I don't hardly really know. At that time I might have known, but it seems to me she went back.

35 Q. Did she go back after Mandy, or do you know?

A. I don't know positively; I could not say positively.

Q. She was out there, though?

A. Yes, sir; she was out there at the time of the——

Q. Go on and tell what occurred there, now.

A. When I started back in the house I think my husband was still on the porch—I can't say positively; but I heard a pistol shot, and that was all the shot I heard. I don't know who fired the pistol.

Q. You had turned your back to go in the house, you say?

A. Yes, sir; my back was to the firing. I could not say anything at all who did the shooting.

Q. Could you say whether you had gotten in the house or not?

A. No, sir; I was not quite in the house. I think I was in the doorway, as well as I remember.

Q. Did you hear anything said at the time the pistol was fired or before it?

A. I heard this other colored man say, "Ed, you have shot me, and all for nothing." That is all I heard.

Q. What became of the colored man, the other colored man?

A. He stepped a few steps off, and I think Ed started to go out at the gate; and this other man sunk down on the grass in the yard there, and my husband called Ed to come back and take the man out, and Ed said, "Oh, he ain't much hurt;" or somebody said it—I don't remember who; and he asked for water, and I went and got him a drink of water; I got a glass of water and carried it to him—sprinkled some in his face. He said he felt faint.

Q. That was the wounded man?

A. Yes, sir. I don't know—I can't remember who carried him away from there, whether Ed carried him or who carried him. I have tried to think since the case has come up; but, anyway, he was carried to a house of colored people very near mine.

36 Q. Had you ever seen the deceased before?

A. Not that I am aware of; no, sir.

Q. What did they call him there that night?

A. They called him Phil Duncan.

Q. Did you see the wounded man after he was carried off?

A. No, sir; I did not.

Q. You did n't see him after he was dead?

A. No, sir; I never saw him any more.

Q. That occurred at your house now in Fort Gibson, in the Indian Territory?

A. Yes, sir.

Cross-examination by Mr. WILLIAM M. MELLETTE:

Q. What time of night do you think that was?

A. Well, it has been really so long ago I would not like to say positively on my oath, but I think it was after 9 o'clock—I am certain it was, because my husband always went to bed at 9.

Q. That is about as near as you can give the time?

A. Yes, sir; I could not tell what time of night. He had gone to bed and was asleep, and he always retired at 9.

The DISTRICT ATTORNEY. Had you been asleep?

The WITNESS. No, sir; I hadn't.

Mr. WILLIAM M. MELLETTE (of counsel for defendant). Had you any particular custom about the time you retired at that time, those nights?

A. No, sir; I generally sit up pretty late reading and writing.

Q. So you could not tell what time you went to bed that night

37 A. No, sir; I have not the remotest idea.

Q. When you first came to the door you say that Ed Alberty had ahold of the other man?

A. He had him by the arm.

Q. Where were they standing?

A. Well, just a little in front of the porch.

Q. On the porch or off the porch?

A. I think they were on the brick—I am not certain—on the walk.

Q. Could you see them well?

A. No, sir; I could not see them well.

Q. Could you tell who they were from looking at them?

A. I do n't really know whether I could have told by looking at them or not. I knew Ed's voice quite well. I could not say positively that I could have looked at them and told who they were. I don't remember. But I knew Ed's voice as soon as he spoke.

Q. Did you go out on the porch immediately after your husband opened the door?

A. Why, I don't know.

Q. You don't know whether you did or not?

A. I could not tell now.

Q. Did you see the other man that was there after Mandy came down stairs?

A. Yes, sir.

Q. Where was he standing?

A. Well, he was standing just a little back of Ed on the walk.

Q. Standing on the walk?

A. Yes, sir.

Q. What occurred when Mandy come downstairs?

A. Well, I don't remember any language that was used. I don't remember anything that was said positively, but I think that Ed told Mandy he wanted to see her about something. I don't know what, though. I don't remember what, for I didn't pay very much attention.

38 Q. Did they talk?

A. They might have talked some; I don't know that they did.

Q. You were standing on the porch, were you, at that time?

A. Yes, sir; I was standing still. My husband was trying to get Ed to go away.

Q. Where were they when they were doing the talking?

A. They must have been just about the edge of the porch.

Q. You don't remember what was said——

A. No, sir; I don't remember a word that was said between them. The accusation that was made I heard, but I don't remember it on my own hearing that night.

Q. You don't remember whether you heard anything about it that night?

A. No; I don't.

Q. Where was your daughter at that time—at the time that Mandy and Ed were talking—just before the shooting?

A. She must have been on the outside of me, nearer them than me.

Q. Do you remember that, or do you just—you say you must have been—do you remember——

A. I do not remember positively.

Q. Is the distance of time so long that you can't remember?

A. No, sir; I can't.

Q. Was she on the porch, or off the porch—that is, your daughter?

A. I could not say positively.

Q. You could not say positively where she was?

A. No, sir.
Q. Did Alberty and his wife talk there?
A. Yes, sir; they talked.
Q. Any length of time, or just a short time?
A. No; it was all done in a very short while.
Q. It was all done in a very short time?
A. Yes, sir; in a very short time.
Q. Now, the last you saw of Alberty—where was he now, that you can remember?
39 A. When I came out and saw him—where was he, do you say?
Q. No; the last time you saw him before you went in the house, where was he?
A. He was standing just to the left of the steps of the porch as I went out—as they went out of the house. That is the last time I saw him.
Q. And then, as you started in, a shot fired just about the time you got in the door?
A. I think it did; yes, sir. I know I had my back—my back was to them when the shot was fired.
Q. Your back was to them when the shot was fired?
A. Yes, sir.
Q. You don't just know where your daughter was at that time?
A. No, sir; I do not, positively.
Q. You can't say about that from recollection; you do not pretend to detail the conversation that took place?
A. No, sir; I do not. I could not.
Q. Simply because you can't recollect it?
A. I didn't pay strict enough attention to it.
Q. Had you known of any trouble between Alberty and Duncan up to this time?
A. No, sir; I didn't know anything at all about either one of their business up to this time.
Q. You hadn't heard anything?
A. No, sir.
Q. You hadn't heard of any trouble between them because of the wife of Alberty?
A. No, sir; I didn't know anything about it.

Redirect examination by the DISTRICT ATTORNEY:

Q. You say that Alberty and his wife had a scuffle?
A. I think that that is as near as I could call it. I don't know what else.
Q. They were scuffling out there?
40 A. He wanted her to sit down there and talk, and she didn't want to, I think.
Q. In good humor, or mad at one another, apparently?
A. Well, really I could not tell whether they were mad or not. I have heard that they were mad.
Q. While they had a scuffle there?
A. Yes, sir.

Recross-examination by Mr. WILLIAM M. MELLETTE:

Q. Was it a moonlight night, or a dark night?

A. Well, I think, as well as I remember, that the moon was shining dimly. I think it was about down. I know that it was not a very bright night.

The COURT. Awhile ago you stated that you didn't hear anything except something, and Mr. Mellettee went on with his question and you did not answer. Did you want to say something then?

The WITNESS. I don't remember.

Witness excused.

41 JEFF BROWN, having been duly sworn upon behalf of the Government, was examined in chief by James F. Reed, esq., the district attorney, and testified as follows, to wit:

Question. What is your name?

Answer. Jeff Brown.

Q. You have an affection of your throat, haven't you?

A. Yes, sir.

Q. Did you know Phil Duncan during his lifetime?

A. Yes, sir.

Q. What relation were you to Phil Duncan?

A. He was my brother-in-law.

Q. Did you marry his sister?

A. Yes, sir.

Q. Where were you living when Phil Duncan was shot?

A. I was living east of Bragg's Station.

Q. Did you go to him?

A. Yes, sir.

Q. Where was he when you found him?

A. He was at Ft. Gibson.

Q. At whose house?

A. At Mr. Lipe's.

Q. Do you mean Mr. Lipe's house?

A. It was a building just outside. I guess it was his.

Q. How long after the shooting took place before you got there?

A. He was shot on Sunday night, and I got there Monday about 11 o'clock.

Q. Who was with you?

A. My wife, Ann Brown.

Q. What condition did you find him in when you got there?

A. I found him shot.

Q. Where.

A. In the right side.

Q. How long did he live after you got there?

A. He lived until Tuesday morning, just about daylight.

Q. Was the bullet taken out of him?

A. Yes, sir.

Q. By whom?

A. By Dr. Hill.

42 Q. From what point was it taken out?

A. It was taken out about two inches from his backbone, and seemed to range right square straight through.

The COURT. On the right side of the backbone?

The WITNESS. Yes, sir.

The DISTRICT ATTORNEY. Seemed to have ranged straight through?

A. Yes, sir.

Q. Have you that ball?

A. My wife has got it.

Q. Do you know what the size of the ball is?

A. Well, it is either a 32 or a 22. It was a small ball.

Q. Who gave you the ball?

A. The doctor.

Q. Has it been in your possession since?

A. Yes, sir.

Q. Did you see the doctor cut it out?

A. Yes, sir.

Q. You saw him cut it out, and he handed it to you?

A. Yes, sir.

Q. What was done with Phillip Duncan's clothing? What became of the clothing that he had on?

A. My wife has got his shirt he had on.

Q. Where did she get that?

A. She got it right off of him when he was stripped and dressed again.

Q. After he was dead?

A. Yes, sir.

Q. You say he died Tuesday morning?

A. Yes, sir; it wasn't daylight.

Q. Did you have any conversation with him as to how he got shot?

A. Yes, sir.

Q. When was that conversation that you had with him?

A. In about half an hour or three-quarters of an hour before he died.

Q. What condition was he in when you got there on Monday?

A. He was in a pretty bad condition.

43 Q. Was he at himself?

A. Yes, sir.

Q. Did you talk to him when you first went there?

A. Yes, sir.

Q. As to how he got shot?

A. Yes, sir.

Q. Then you had a conversation with him in half an hour before his death?

A. Yes, sir.

Q. At that conversation, or any of these conversations, what did he say about his belief as to whether he would get well or whether he would die?

A. He had no belief of getting well. The doctor himself had told him that he could not.

Q. Did he tell him that in your presence?

A. Yes, sir.

Q. What did Phillip himself say about getting well?

A. He said there was no hopes of him.

Q. What did he say now with reference to the manner in which he had been shot? Tell all he said about it.

A. Well, he said that he was going down to a house by the name of Gray, and he said in going along he said Ed Alberty rose up out of the weeds and held him up, and taken him and took him back to Mr. Lipe's, out in front of Mr. Lipe's there. He said he could have caught him and prevented him from shooting him, but he said he had no idea he was going to shoot him.

Q. Did he say what he had taken him up to Mr. Lipe's for?

A. He didn't say. He just took him around, and he said, "I am going to kill you."

Q. He said, "I am going to kill you"?

A. Yes, sir.

Q. And he said he could have caught him and prevented him shooting, but he had no idea he was going to shoot him?

A. Yes, sir; he didn't have no idea——

Q. Was he strong enough to talk much at that time?

A. Yes, he could talk.

44 Q. He could talk?

A. Yes, sir; he could talk as good as he ever talked.

Q. When was it, did you understand from him, Alberty told him he was going to kill him?

A. That is when he first held him up and was bringing him around.

Q. Did he say what the cause of Alberty's anger towards him was?

A. He said that Alberty told him, he says, "You are trying to go to where my wife is," or something to that amount, and he said he told him he wasn't.

Q. Go on and tell all he said, as near as you can remember it.

A. That is just about the end of the subject.

Q. Did he say what occurred after they got over to Mr. Lipe's house?

A. He said they talked there a few minutes and Ed Alberty shot him, and then kicked him after he shot him. He said he told him not to treat him that way, for he had already killed him.

Q. That was after he was down?

A. Yes, sir.

The COURT. That is, the man who was shot said not to treat him that way, that he had already killed him?

The WITNESS. Yes, sir.

The DISTRICT ATTORNEY. This man Phillip Duncan was a negro, you say?

A. Yes, sir.

Q. Where was he raised?

A. He was raised in the Choctaw Nation.

Q. How old was he at the time of his death?

A. I suppose that he must have been about 25 or 26; somewhere along there. I knew him from a small boy.

Cross-examination by Mr. WILLIAM M. MELLETTE:

Q. Was Duncan married at the time he was killed?

45 A. He was living with a woman, but whether he was married or not to her I don't know.

Q. Who was that woman he was living with?

A. Her name was Jennie.

Q. Jennie what?

A. They called her Jennie Duncan.
Q. Do you know who she was before she was married?
A. Jennie Lasley.
Q. She was a citizen of the Cherokee Nation?
A. Yes, sir.
Q. Jennie Lasley was a freed woman of the Cherokee Nation, and a citizen of the Cherokee Nation?
A. Yes, sir.
Q. How long had Duncan been living with her?
A. They lived together a short space of time. They parted. I don't know how long they had been parted when he was killed.
Q. I will ask you if she was not his lawful wife?
A. I suppose she was.
Q. You did understand that they had been lawfully married?
A. Yes, sir.
Q. What made you say then that he was living with a woman?
A. I don't know.
Q. You understand that they were reputed to have been lawfully married?
A. Yes, sir.
The COURT. You could not prove marriage by reputation.
Mr. WILLIAM M. MELLETTE (of counsel for defendant). If he held her out as his wife——
The COURT. That is a different proposition. As to what conduct would make a common law marriage is different from whether he understood that they were properly married.
Mr. WILLIAM L. MELLETTE (of counsel for defendant). He recognized her and called her his wife, didn't he, before that time?
A. Yes, sir.
Q. Had you been at their house?
A. Yes, sir.
Q. When they were living together?
A. Yes, sir.
46 Q. They lived there as man and wife?
A. Yes, sir.
Q. Represented themselves as man and wife?
A. Yes, sir; I had paid them one visit before.
Q. Who was Duncan's father? Did you know him?
A. He was a Choctaw Indian.
Q. Who was his mother?
A. His mother was a colored woman, a citizen of the Choctaw Nation.
Q. Where did she live?
A. Citizen of the Choctaw Nation.
Q. Were they married—Duncan's father and mother?
A. No, sir.
Q. Did they live together as man and wife?
A. No, sir.
Q. They didn't live together as man and wife?
A. No, sir.
Q. Then Duncan really had Choctaw blood in him?
A. He was a half Choctaw.

Q. Where was he born?
A. In the Choctaw Nation.
Q. How long had he lived in the Choctaw Nation before he came to the Cherokee Nation?
A. He came to the Cherokee Nation when he was about 17 years old.
Q. Came to Ft. Gibson?
A. Yes, sir.
Q. Did you know Ed Alberty?
A. Yes, sir.
Q. How long have you known him?
A. I have known him from a boy.
Q. Did you know his father and mother?
A. No, sir.
Q. When did you first get acquainted with him?
A. Just right after the surrender.
Q. Is he a citizen of the Cherokee Nation?
A. Yes, sir.
Q. Who owned him during the war?
A. I don't know that.
Q. You are a citizen of the Cherokee Nation, are you?
A. Yes, sir. Ed Alberty is a cousin of mine.
Q. You know he is a citizen of the Cherokee Nation?
A. Yes, sir.
47 Q. Where did you first get acquainted with him?
A. Ft. Gibson.
Q. How long after the surrender?
A. Just right after the surrender.
Q. The same year of the surrender?
A. Yes, sir.
Q. That was 1865?
A. Yes, sir.
Q. Did he live at Ft. Gibson after that up to this occurrence, or in that neighborhood?
A. Yes, sir.
Q. You say that Duncan told you that this man kicked him after he was down?
A. Yes, sir.
Q. Where did he say he was lying at the time he kicked him?
A. Lying over there where he was shot.
Q. In the yard?
A. Yes, sir; he didn't exactly locate the place where he was lying. He said over there where he shot him.
Q. That Alberty kicked him after he shot him?
A. That is what he said.
Q. He said he was on his road down to Graves's house at the time that Alberty found him?
A. Yes, sir.
Q. It is Graves, is it not, and not Gray?
A. I think that is the name.
The DISTRICT ATTORNEY. Which is it, Graves or Gray?

The WITNESS. Gray, I believe, is the man's name. I am not well acquainted with the man, but I believe that is his name.

Mr. WILLIAM M. MELLETTE (of counsel for defendant). What did he say he was going down to Graves's for?

A. He didn't say.

Q. Did he tell you that Ed Alberty lived at Graves's?

A. No, sir.

Q. But he did say he was going to Graves's house when Alberty found him?

A. That is what he said.

48 Q. Did you know that Ed Alberty lived down at Graves's house?

A. No, sir.

Q. You didn't know that?

A. No, sir.

Q. How close to Graves's house did Duncan say that Ed Alberty found him?

A. He didn't say that.

Q. He didn't make any statement about that?

A. No, sir.

Q. Do you know where Graves lived?

A. Not exactly.

Q. That is the man who is here now, is it not?

A. I believe it is.

Q. His name is Graves instead of Gray. I guess that is the same man. His name is Thomas R. Graves. What time of night did he say it was when Ed Alberty found him down there?

A. He said it was after dark. He didn't say what time it was. He said he had been up to the church and went from the church down there.

Q. He said he had been up to the church and started from the church towards Graves's house?

A. Yes, sir.

Q. That he was going to Graves's house?

A. Yes, sir; going there.

Q. Did he tell you he was going to Graves's house hunting Ed Alberty?

A. No, sir.

Q. He didn't tell you that?

A. No, sir.

Redirect examination by the DISTRICT ATTORNEY:

Q. What did they call Duncan—"Phil" Duncan?

A. Yes, sir.

Q. That was the name he went by—the name he was called by?

A. Yes, sir.

Q. Phil Duncan?

A. Yes, sir.

49 The COURT. How old was Phil when he was killed?

The WITNESS. I guess he was 25 or 26. He might have been 26 or 27; I don't just remember.

Recross-examination by Mr. WILLIAM M. MELLETTE:

Q. I will ask you how old he was when he came to the Cherokee Nation? You stated 17 years old.

A. Yes, sir; he might have been about 17 years old—somewheres along there.

Q. When you came to the Cherokee Nation. He lived in the Cherokee Nation continuously up to the time he was killed?

A. Well, no, sir; sometimes he would be up in Kansas.

Q. Was that his home there in the Cherokee Nation?

A. Yes, sir; he generally made where I lived his home.

Q. Where you lived was his home; but then sometimes he would go up into Kansas?

A. Yes, sir.

The COURT. Did you know his mother?

The WITNESS. Yes, sir.

The COURT. Was she a slave?

The WITNESS. Yes, sir.

The COURT. Phil was born during slavery, wasn't he?

The WITNESS. Yes, sir.

The COURT. Born a slave himself, wasn't he?

The WITNESS. Yes, sir.

The COURT. You knew his master?

The WITNESS. Yes, sir.

The COURT. What was his name.

50 The WITNESS. Blackwell.

The COURT. Did he own the mother, too?

The WITNESS. Yes, sir.

The COURT. Both was born in a state of slavery?

The WITNESS. Yes, sir.

The COURT. Before the war?

The WITNESS. Yes, sir.

The COURT. In the Choctaw Nation?

The WITNESS. Yes, sir.

Mr. WILLIAM M. MELLETTE (of counsel for defendant). He *he* was only 17 years old——

The COURT. He was 26 or 27, he says, when he was killed. He was killed in 1880. That would bring him away back yonder. He was born about 1854, according to that.

Witness excused.

51 Mrs. ANN BROWN, having been duly sworn upon behalf of the Government, was examined in chief by James F. Read, esq., the district attorney, and testified as follows, to wit:

Question. What is your name?

Answer. Ann Brown.

Q. Did you know Phil Duncan during his lifetime?

A. Yes, sir.

Q. What relation was he to you?

A. A brother.

Q. Your brother?

A. Yes, sir.

Q. Did you hear of his being killed, or being shot?

A. Yes, sir.

Q. How long after he was said to have been shot before you heard it?

A. Well, the way I heard it, he was shot on Sunday night, and I heard it on Monday morning.

Q. Where was he at that time—your brother?

A. He was living at Gibson.

Q. Where did you find him when you found him Monday?

A. Found him there at a house close to Mrs. Lipe's. An old colored gentleman lived there by the name of Prince Albert, I believe. He was 'tending on him when I got there.

Q. What condition was he in at the time you got there?

A. He was in a very bad condition.

Q. Did you see the wound upon his body?

A. Yes, sir.

Q. Where was he shot?

A. He was shot to the right.

Q. What become of the ball? Did it go clear through him?

A. No, sir; the ball was cut out.

Q. Who cut it out?

A. Dr. Hill.

Q. Did you see him when he cut it out?

A. No, sir; I wasn't looking, but I was right there in the house.

Q. What became of that ball?

A. I have got it.

52 Q. Where did you get it?

A. I got it there after it was cut out.

Q. Who gave it to you, do you remember?

A. Well, I believe that my husband gave it to me.

Q. That was your husband, Jeff Brown, who was just in here?

A. Yes, sir.

Q. Let me see the ball, please. What became of the shirt that was on Phil?

A. I have it here.

Q. Was that on him when he died?

A. I don't remember whether it was on him—yes, I guess it was on him when he died. I didn't have anything to do with handling him at all.

Q. Who gave you the shirt?

A. I got the shirt there; they had it in the washtub, and I wrung it out and took it home.

The COURT. Was there blood on it when you saw it?

The WITNESS. Yes, sir.

The COURT. There was blood on the shirt?

The WITNESS. Yes, sir.

The COURT. In the washtub?

The WITNESS. Yes, sir.

The COURT. You wrung it out?

The WITNESS. Yes, sir; and taken it home.

Witness produces ball referred to by her in her testimony, and the same is shown to the jury by the district attorney.

Witness produced shirt referred to by her in her testimony, and shows bullet hole in it, and the same is exhibited to the jury by the district attorney.

The DISTRICT ATTORNEY. Do you know whether this was your brother's shirt or not?

The WITNESS. Yes, sir; I know it was my brother's shirt.

53 The COURT. You say you saw it in the washtub. Where was it then?

The WITNESS. After it was taken off of him?

The COURT. Was that at the place where you found him?

The WITNESS. Yes, sir.

The COURT. At that colored man's house there?

The WITNESS. Yes, sir.

The DISTRICT ATTORNEY. Was the bullet cut out before or after his death?

A. I don't remember. They probed for the ball first, and then afterwards they cut the ball out, but I don't remember now whether they cut it out before he died or whether it was afterwards. I don't remember.

Q. Did your brother say anything to you about what he thought about getting well after you got there?

A. I didn't talk any to him. He was talking to my husband.

Q. You didn't talk to him?

A. No, sir; I didn't talk any to him, I only heard him talk. I only stood by and heard him talk to him, but I didn't ask him any questions myself.

Q. Do you remember what he said as to whether he would get well or not?

A. He said, when we got there, that he didn't think he would get over it, and for to send for his mother. "I don't think I will get over it, and send for mother," is what he said.

Q. That is when you first got there. How long before his death was it that your husband talked to him?

A. It was along in the evening—in the afternoon. I don't know what time it was we got to Ft. Gibson, but it was, I reckon, about 1 or 2 o'clock, as near as I can remember.

Q. Did you hear him at any time say he believed he was going to die?

A. Yes; he said, "I don't think I can make it, and send for mother."

54 Mr. WILLIAM M. MELLETTE (of counsel for defendant). That is rather a leading question. I would rather she would say what he said.

The DISTRICT ATTORNEY. Did you hear him say anything else than what you have already stated on that subject?

A. No; I didn't hear anything more until mother come.

Q. After your mother came, what did he say about it?

A. She went to the bed where he was——

Q. What did he say about it when your mother came?

A. She went to the bed where he was, and she says, "You are in a bad fix, ain't you, son?" and he said, "Yes;" and he says, "I don't think I can make it." That is what he said. That is all he said to her after she come. It was after night, but I don't know what time of night it was. It was pretty late in the evening when we sent for her.

Q. Was that all you ever heard him say about getting well?

A. Yes, sir.

Q. Did you hear the doctor say anything to him about whether he could recover or not?

A. No, sir.

Q. I will not attempt to prove any declarations by you.

A. I hardly staid in the house where he was. I couldn't stay where he was.

Cross-examination by Mr. J. C. BYRES:

Q. Whereabouts were you living at that time? How far was it from where this thing occurred?

A. I guess, as near as I can remember—I believe they call it 12 miles from Ft. Gibson——

Q. When were you sent for?

A. I lived at the court-house on Greenleaf.

55 Q. What time did you receive information of this trouble?

A. I don't know what time of day it was, but it was on Monday.

Q. Then you went immediately over to where he was, did you?

A. Yes, sir.

Q. What time was it when you got there?

A. I told you awhile ago that I didn't remember exactly what time of day it was when we got there, but it was along in the afternoon.

Q. Did your brother have that shirt on at that time?

A. Yes, sir.

Q. At the time you got there?

A. Yes, sir.

Q. Who all was there; do you remember?

A. No, sir.

Q. Was the doctor there at the time you got there?

A. No, sir.

Q. He had gone. You don't know at that time whether this bullet had been taken out of him or not?

A. No, sir; he came after we got there, Dr. Hill did. He may have been there, though, before I got there.

Q. At what time was it that this bullet was given to you? You say it was given to you by your husband?

A. It was directly after he died.

Q. Was it right there?

A. Yes, sir; right there in that house.

Q. And you don't know, then, I believe you say, whether the bullet was taken from him while he was alive, or after he was dead?

A. No, sir; I don't remember.

The DISTRICT ATTORNEY. I can settle that by calling her husband back.

Mr. J. C. BYRES (of counsel for defendant). It don't matter. I just wanted to refresh her memory.

The WITNESS. I don't remember whether it was before or after he died. I don't remember.

Witness excused.

56 JEFF BROWN, being recalled upon behalf of the Government, was further examined by James F. Read, esq., the district attorney, as follows, to wit:

Question. I don't remember whether you stated or not, but was the ball cut out of Phil Duncan before or after he was dead?

Answer. After he was dead.

Q. I understood you to say you were present and saw the doctor cut it out?

A. Yes, sir.

Q. He handed it to you?

A. Yes, sir.

Q. And you gave it to your wife?

A. Yes, sir.

Recross-examination by Mr. J. C. BYRES:

Q. How far was the ball from the surface; do you know?

A. Do you mean from going through?

Q. It was taken out here behind, was it not?

A. Yes, sir.

Q. How far was it from the surface? Do you know how deep an incision, or how deep a cut, the doctor had to make to find the ball?

A. I reckon about half an inch.

Q. How near was it to the backbone.

A. About two inches.

Q. To the right or left?

A. To the right.

Witness excused.

Whereupon, the hour of adjournment having arrived, court was accordingly adjourned until Thursday morning, November 14th, 1895, 8.30 o'clock.

57 Thursday morning, 9.00 o'clock, November 14th, A. D. 1895, court met pursuant to adjournment, when the following among other proceedings were had, to wit:

HARRY STARR, having been duly sworn upon behalf of the Government, was examined in chief by James F. Read, esq., the district attorney, and testified as follows, to wit:

Question. What is your name?

Answer. Harry Starr.

Q. Do you know the defendant, Ed Alberty?

A. Yes, sir.

Q. How long have you known him?

A. Well, I have been in Ft. Gibson about 21 years.

Q. Where were you at the time Phil Duncan was killed?

A. In Ft. Gibson.

Q. How long did he, the defendant, remain there after that killing?

A. I don't know how long he did remain there.

Q. Did he remain there all the time up to the time of his arrest?

A. No, sir.

Q. Did he remain there two days or three, or week, or how long?
A. No, I don't think he did.
Q. You think he left shortly afterwards?
A. Yes, sir.
Q. Where did you see him next?
A. St. Louis.
Q. When?
A. The 7th day of this gone August.
Q. August just passed?
A. Yes, sir.
Q. Who did you go up there with?
A. George Lawson.
Q. Who is George Lawson?
A. He is a deputy marshal here, I think.
58 Q. What did you go for?
A. I went to identify Ed.
Q. What was Lawson going for?
A. He went there, I suppose, to bring him here.
Q. To arrest him?
A. Yes, sir.
Q. Did you see Ed?
A. Yes, sir.
Q. Did you have any conversation with him?
A. No more than the chief of police asked him did he know me, and he said he didn't, and he asked me if I knew him, and I told him I did, and he asked me what was his name, and I told him Ed Alberty.
Q. What name was Ed going by up there?
A. Burns.
Q. Ed said he didn't know you?
A. Yes, sir.
Q. How long had Ed known you then?
A. I guess it was between four and five years in Gibson before he left there.
Q. He said he didn't know you, and that his name was Burns?
A. Yes, sir.
Q. Did he say whether he had ever lived in the Indian Territory or not?
A. He didn't tell me.
Q. Did he tell anyone in your presence?
A. No, sir.
Cross-examination waived. Witness excused.

59 JOE WEIGHTY, having been duly sworn upon behalf of the Government, was examined in chief by James F. Read, esq., the district attorney, and testified as follows, to wit:

Question. What is your name?
Answer. Joe Weighty.
Q. Do you know Ed Alberty?
A. Yes, sir.
Q. Did you know Phil Duncan?
A. Yes, sir.

Q. Do you remember when Phil was killed?
A. No, sir; I do not.
Q. Did you hear of the killing at the time?
A. Yes, I seen Phil after he was dead.
Q. Did you ever hear Alberty make any threats prior to the killing of Phil Duncan?
A. No, sir; not at the time, more than he made the threat after he had the fuss with another man. He wasn't fussing with Duncan.
Q. After he had a fuss with another man?
A. Yes, sir; a man by the name of Bill Ross.
Q. What did he say?
A. He just only said that there was two men that was in his path; that he intended to put their lights out.
Q. Did he say who they were?
A. No, sir; he didn't call no names.

Mr. WILLIAM M. MELLETTE (of counsel for defendant). I object to that, then.

The DISTRICT ATTORNEY. I will not insist on it. (To the witness): You never heard him make any threats against Phil Duncan himself?
A. No, sir; I dod not.

Cross-examination waived. Witness excused.

60 Government rests.

61 And the defendant, to maintain the issues upon his part, produced and examined the following-named witnesses, to wit: Ed Alberty, alias Charles Burns (the defendant), Thomas R. Graves, Rachel Graves, Nora Sanders, Jim Smith, Abe Davis, Sank Vann, who testified, respectively, as follows:

62 *Testimony introduced by the defendant.*

ED ALBERTY, alias CHARLES BURNS, the defendant, being duly sworn in his own behalf, was examined in chief by Mr. William M. Mellette, and testified as follows, to wit:

Question. What is your name?
Answer. Ed Alberty is my name now—of course I went by that name while I was with my master.
Q. What was your father's name?
A. My father's name was Burns. He went by the name of Charles Burns.
Q. Your master's name was Alberty?
A. Yes, sir.
Q. Where were you raised?
A. Well, sir, I was raised partly in the Cherokee Nation. I lived right across the river here the first I ever can recollect myself; I lived right across the river in the Cherokee Nation.
Q. Were you a slave?
A. Yes, sir.
Q. Was Alberty a Cherokee Indian?
A. Yes, sir.
Q. You say the first you can remember you were living just across the river here with Mr. Alberty?

A. Yes, sir.

Q. He was a Cherokee Indian and owned you as a slave?

A. Yes, sir.

Q. Are you a citizen of the Cherokee Nation?

A. Yes, sir.

Q. You are what is known as a colored citizen, a freedman, citizen of the Cherokee Nation?

A. Yes, sir.

Q. Where did you live after you had grown up, after the war?

A. After I had grown up I lived at Ft. Gibson. After I got up to be some size I lived at Ft. Gibson for a few years, and then I come
63 in the country here between here and Ft. Gibson, up in the Territory here, and I staid there for about a year or two with my cousin, this Jeff Brown's sister.

Q. Where did your father and mother live during the war?

A. Well, sir; I don't remember my mother—and my father—I never did see my father to remember him. My mother, I can kind of remember her. I can remember when she was buried; she was buried right across the river here.

Q. Was that before the war?

A. I could not tell. I believe it was in the war time. I don't remember much about the war, any of it.

Q. You believe it was in the war time?

A. Yes, sir.

Q. How old a man are you now?

A. Well, sir; I am about 42, as near as I can come at it.

Q. Where were you at the close of the war?

A. I think I was in Texas. I know I was in Texas with my master; I think I was.

Q. Did you come back to the nation with him?

A. Yes, sir; I come back to the nation with him.

Q. How soon after the surrender?

A. Well, I don't know when the surrender was. There wasn't no war then. Of course, I never seen no war——

Q. You came back in time to become a citizen of the Cherokee Nation?

A. Oh, yes; I come right though this place, and there was lots of colored soldiers here at that time.

Q. And you went on to the nation?

A. Yes; went right on to Ft. Gibson.

Q. How long before Phil Duncan was killed had you been acquainted with him? How long had Phil Duncan been living at Ft. Gibson at the time he was killed?

64 A. Well, the first I knew him, I guess it must have been about 1869 or 1870, somewhere along there.

Q. Where did you get acquainted with him?

A. Right there at Gibson.

Q. Did he live there up to the time he was killed?

A. Well, off and on. He didn't live there all the time, but the biggest part of his time he lived there.

Q. Did you live there all the time principally from then on up to the time he was killed?

A. Yes, sir; I never was away more than a month or two at a time—well, I was away two or three months after I become to be pretty good sized boy; I went away with the soldiers and was waiting on commissioned officers.

Q. When did you marry?

A. I married in 1872.

Q. Were you living with your wife at the time that this killing occurred?

A. She was working—she was staying at Mr. Lipe's, and I was working there, and I had the children at Mr. Graves's, and I staid there. Of course, I would go and see her once in awhile, and she would come over there and see me.

Q. Graves, or Gray?

A. Graves.

Q. Thomas R. Graves?

A. Yes, sir.

Q. You slept at Graves', and she slept at Lipe's?

A. Yes, sir; you see I had my two biggest children with me because I wanted to keep them together, and I had them with me, and she had the baby with her, keeping it with her.

Q This man Duncan that you killed, on what terms were you and he before the killing?

A. At least I thought we were always friends—at least I was always sociable with him. It simply was this. He was in our family—was married to one of our cousins, and there is where I always liked him, because I liked my cousins. I don't know whether he was married or not, but anyway he was living with her.

65 Q. On the night of the killing, where did you go that night first?

A. Well, in the front part of the night I went up to Tucksy Sanders's house until church time.

Q. You were at church, were you?

A. Yes, sir; I went from there to church.

Q. Where did you go from there to church?

A. From church I went with my wife up to Mr. Lipes's house—well, I went as far as the gate with her, and then I stopped there until she got in the house, and then, of course, I had to go to work next morning, which I was working there during the day, and I had to go to work Monday morning to do some plowing in his garden there, and so I goes in the lot to see about the horses; the horse' had been getting out at night and went off in the prairie and I would have to get them up, and I went in the lot to see if they were there, and I went and found them there, and, of course, I was doing a little job in there, and so that kept me in there quite a little while.

Q. Now, up to that time did you know of this man that was killed being intimate with your wife, or anything of that kind?

A. I had heard it time and again, but then at the same time I didn't never see anything, because I never could get to see him no more, and another thing I never watched around after them because I thought she was true to me.

Q. Now, just state to the jury where you first saw him, after you came home with your wife, where you found him.

A. Well, I came then out of the lot into the front yard, and right—before that I will say, though, I was in the stable there and I seen the window go up what led to my wife's room; I seen the window go up, and I says to myself "What is she raising that window for?" I
66 just said that to myself. And so I then goes right on in the front yard; was going out the front gate, and I met this man right there, just where the window had raised; I seen him there, and I says to him, I says, "Who is that?" and he says "God damn you, you will find out who it is," and then made at me at that time. That is the first time I had seen him there. And then I knew his voice, and he made at me as if he had something and was going to kill me, and I had this little pistol in my pocket and I run backwards towards the front yard, and told him to stand o'f, to stand off, and then by that time, we made lots of noise there, and I called Mr. Lipe. I still had my eyes on him, and I said "I am going to tell Mr. Lipe you were trying to get up in his window." I said, just like that. And I still called Mr. Lipe, you know, and he got up and come to the door, and he said "What is the matter here?" and I says, "This man here was trying to get up in your window where my wife sleeps, looks so," I said to him, just like that. We stood there and Mr. Lipe come to the door, and he says "I don't want no fuss in my yard," just like that, "I don't want no fuss in my yard, Ed." I says "All right; I won't have no fuss in your yard," and then I moved away—I started to move, and this fellow says to me, he says, "I will kill you, God damn you," and made for me. He was between me and the house, and I was next to the gate, and I broke for the gate to try to get out of his way, and as I broke for the gate he was coming at me, seemed like he was going to cut me with something, I couldn't tell what it was, and I threw myself right around that way [illustrating], and fired. I always liked the man, and I was scared at him after he had tried to kill me previous before that time. He had tried to kill me twice. He had shot at me twice before that, and I was afraid of the man.

Q. You say after you got around in the front yard and had called
67 Mr. Lipe, that he told you he would kill you, and started towards you?

A. Yes, sir; that was the second time in the yard.

Q. He had his hand up, and you thought he was going to kill you?

A. Yes, sir.

Q. I will ask you if he had ever made any assault on you before that?

A. Oh, yes.

Q. Where?

A. Now, the first time it was at Nora Sanders's house, or her husband's house—it is the same thing.

Q. How long was that before the killing?

A. I guess that probably might have been maybe two weeks, or maybe not quite so long.

Q. What was done there?

A. I went there and staid there a little while that night, and we were practicing—I was playing the guitar and he was playing the vio-

lin—and I staid there a little late, and he said it was as well to stay all night, and he made a pallet for me on the floor, and I had just laid down, and this man came there and called for me, and I answered, and he said, "Get up and come out here; I want to see you," speaking short, just like that, and I said, "No; I am gone to bed; I can't get up." I says, "Phil, I can't get up," and he said, "God damn you, I want to see you, anyhow!" and I said, "I can't get up. What do you want to see me for?" and he said, "Are you coming?" and I said, "No; I am not coming;" and then he said, "God damn you, you will come!" and he shot right through the door, right where he could hear my voice. I was laying down, and the ball passed just under my head; went plumb through the door.

Q. That was about two weeks before the killing?

A. Yes, sir.

Q. Had he ever made any assault on you at any other time?

A. Not before that. Previously after that he did again.

Q. Where?

68 A. At the barber shop. He come in the barber shop then and run me out with his revolver, and I happened to escape that time, and he fired one shot at me then. I jumped out of the door and run out there. That was the second time then. Then I commenced to get scared of him.

Q. Who was about the barber shop at that time?

A. There was George C. Davis, Abe Davis, Smith and Tucksy Sanders, and I disremember who else; but, anyway, they were all present, and myself.

Q. Those are two times that he had tried to kill you?

A. Yes, sir.

Q. What did he have there at the barber shop?

A. He had a revelver then that night.

Q. Did you run?

A. Certainly I run.

Q. Who else ran?

A. Well, George C. Davis and I run together, you see. He followed me right up. After he seen the fellow was after me he run right out, too, at the same time.

Q. That was just a short time, then, before he was killed?

A. Yes, sir; I never saw him any more until that night. I never laid eyes on him, and I don't know where he was until that night.

Q. Then you and he were not on good terms at the time of the killing—that is, he had been trying to kill you?

A. Yes; and I was scared of him at the time, or anybody else would have been, after he had tried to kill me that many times.

Q. Now, did you meet him that night? Did you take him that night—did you find him down towards Mr. Graves's there, and compel him to go back up to Lipes's house that night?

A. Right where I told you I saw him is where I saw him—right in the yard. There is where I saw him.

Q. After the shooting where did you go?

A. I went out right towards the fort, and then I went up to the first house. I went to see Mr. Hucksley. I went up there to tell him I had got into a row.

Q. When did you leave Ft. Gibson?

69 A. I left Ft. Gibson the next night following.

Q. Why did you leave?

A. Well, sir, I will tell you just why I left. My heart was broke, and I just didn't care to stay; I thought I would just go away from the country where I would never hear from my people any more, because my heart was broke, and my children was all young, and they had just commenced to love me, and my heart was broke at that time, and that is the reason I went away.

Q. Where did you go?

A. I first went to my sister's.

Q. Where is that?

A. She lived at Ft. Scott, Kansas, then.

Q. Then where did you go?

A. I went from there to Kansas City.

Q. How long did you stay there?

A. I went to work there, and I went to work in the St. James Hotel, and I staid there I guess in that hotel; I worked there about 6 months, and then I quit that hotel and went to the Pacific House in the same place, in Kansas City, and I staid there between two years and a year and a half; but, anyway, I think it was two years that I staid there, worked there at that house, right at that hotel.

Q. Then where did you go?

A. I staid there, I knocked around there and worked at first one thing and another, jobbed around there, sometimes I would work down there where they kill hogs.

Q. The slaughter house?

A. Yes, sir; I worked there awhile, and then I staid around there and I went from there to Leavenworth and worked in the fort; I staid in the fort there working for officers again for about—I staid there I guess a year at Leavenworth.

Q. Then where did you go?

A. I went over to St. Louis, and I staid right there until I was brought from there here.

Q. In St. Louis there during the time you staid there did you see people from the Territory at any time?

70 A. I did. I saw them once in awhile—well, not up until about seven years ago was the first I seen.

Q. Where were you working at the time you were arrested?

A. I was working at the Union Station.

Q. At the new Union Depot at St. Louis?

A. Yes, sir.

Q. What were you doing there?

A. I was a porter there.

Q. What were you getting a month?

A. $45.00 a month.

Q. Had you married in the meantime?

A. I had been married, and my wife she died; the one that I married she died a couple of years ago, just a couple of years ago in next month.

Q. When were you first arrested on this?

A. I was arrested right there at the depot.

Q. What was done with you?

A. They carried me down to the hold over and kept me there; I was arrested on Sunday and they kept me there until Thursday morning, and they released me, and then I went back to work. I went right back to work, and I staid there until they arrested me again the next Sunday morning coming.

Q. They arrested you at one time and kept you four or five days, and then turned you loose?

A. Yes, sir.

Q. What did they arrest you for at that time?

A. They said I had done some murdering down here in the Territory.

Q. They arrested you and turned you loose and you went back and worked at the depot, and the next Sunday morning they arrested you again?

A. Yes, sir; I told the authorities I wouldn't run away, if they wanted me they could come and get me, and told them where I lived, where I was working, and if they wanted me I would be there.

Q. And you were there?

A. Yes, sir; I was right there when they come for me.

Q. Did you see that man that was killed that night until you
71 saw him there in the yard?

A. I never had seen him for I don't know how long it had been. I hadn't laid eyes on him from the night he come at me in the barber shop until that night.

Cross-examination by the DISTRICT ATTORNEY:

Q. How long had it been since the affair in the barber shop up to that night? How long before that that you met him in the barber shop? How long before that night had it been since you saw him in the barber shop?

A. Well, I could not tell just exactly.

Q. Well, about.

A. It was between a week and five days.

Q. And yet you say you felt friendly towards him when you met him there in the yard at Mr. Lipe's?

A. Well, of course, I was afraid of him. I didn't say that I felt friendly with him; I said before that time we always had been friends.

Q. Then you were not friendly with him when you met him in Mr. Lipe's yard?

A. Well, of course, I never had nothing against him only the time when he had tried to kill me.

Q. He had tried to kill you twice?

A. Yes, sir; that is the only feelings that I had against him; that I was scared at him of that.

Q. You were afraid of him, then?

A. Yes, sir.

Q. You were afraid of him?

A. Yes, sir; I was afraid of him.

Q. You were out in the lot, you say?

A. Yes, sir.

Q. And you saw the window to your wife's room go up?

A. I did.

Q. She was rooming upstairs, wasn't she?
A. Yes, sir; I could see it plainly right from where I was.
Q. In the back room upstairs?
A. Yes, sir.
72 Q. Back room over the kitchen?
A. Yes, sir.
Q. This man was clim'ing up at the back end of the house, was he?
A. Yes, sir.
Q. How was he going up?
A. There was kind of a little ladder there next morning—of course I came back next morning.
Q. Where was he standing when you saw him?
A. He was standing there in the yard making an attempt, or had his hand on the ladder to go up on the ladder.
Q. When you asked him who he was he ran at you, did he?
A. Yes; he turned around and he said, "God damn you, you will find out who it is," like that, and come right at me then.
Q. How did you get him around in front of the house?
A. He kept coming on me, and I pulled my little pistol and I said, "Stand back, don't come any closer!" and I said, "I am going to hollo for Mr. Lipe."
Q. Where did you commence holloing for Mr. Lipe?
A. I was then right near his porch.
Q. This man kept following you up?
A. Yes, sir; he kept moving on me and I told him to stand back.
Q. You had your pistol in your hand?
A. Yes, sir; because I was scared of him.
Q. You say you and your wife were on good terms at that time?
A. We were speaking.
Q. Were you on good terms?
A. Yes, sir.
Q. Don't you know you had practically separated?
A. Well, no——
Q. You were living apart?
A. No, we were not; because I could see her and could send for her, and she——
Q. Wasn't you living with another woman?
A. No, sir.
Q. Didn't you live with another woman after that?
A. No, sir.
73 Q. Didn't you have a child by another woman?
A. No, sir; not as I know of.
Q. A woman by the name of Jane Nave? Do you know her?
A. I knew her.
Q. Hadn't you been living with her?
A. No, sir; that was this Phil Duncan's woman. He had a child by her himself.
Q. You say you and your wife were entirely friendly?
A. Yes, sir.
Q. Living together as man and wife?
A. Yes, sir.

Q. Never had been any trouble between you?
A. We had little spats.
Q. I mean there had never been anything like a separation?
A. No, sir.
Q. You say that, do you?
A. Yes, sir.
Q. That was the first time you ever knew, of your own knowledge, of this man trying to get to your wife?
A. No more than what I heard; that is so.
Q. You had never known anything before that?
A. No, sir.
Q. What were you doing with a pistol that night?
A. Well, I will tell you; it was night, and I was expecting this man would run on me at any time, and I was afraid of him; he had done shot at me, and I was afraid of him. That is the reason I had it. I will tell the truth.
Q. You were carrying a pistol for him?
A. Yes, sir; I was carrying it to keep him off of me, because I know what he would do; he would shoot you, or cut you, or he would kill you, or anything.
Q. He was a bad man?
A. Yes, sir; that is just the kind of a man he was, because I had almost growed up with him, and I knew what he would do.
Q. You went away from there and changed your name, didn't you?
74 A. Yes, sir.
Q. As soon as you left there?
A. Yes, sir.
Q. What did you do that for?
A. It was just like this: After I had got away and got a job I was settled down, and had pretty near worked my sadness off, and then I just said, "I will just go by my father's name."
Q. And you did deny you were Ed Alberty when you were arrested?
A. Yes, sir; certainly I did.
Q. And you said you had never been in the Territory, did n't you?
A. Well, I don't remember as I said—I said not lately. I said, "I have not been in the Territory lately; it has been a very long time."

Witness excused.

75 THOMAS R. GRAVES, having been duly sworn upon behalf of the defendant, was examined in chief by Mr. William M. Mellette, and testified as follows, to wit:

Question. What is your name?
Answer. Thomas R. Graves.
Q. Where do you live?
A. Ft. Gibson.
Q. How long have you lived there?
A. Off and on ever since July, 1872.
Q. Do you know the defendant, Ed Alberty?
A. Yes, sir.
Q. Did you know Phillip Duncan?

A. Yes, sir.

Q. Where was Alberty living at the time he killed Duncan?

A. He was staying with me.

Q. How long had he been living there?

A. I won't be positive, but I think it was somewhere along about three years, as near as I can get at it.

Q. How long ago has it been since this occurred?

A. I don't know exactly, but I judge it to be close on to 17—16 or 17 years; somewheres along there.

Q. Did you see the man that was killed, Phillip Duncan, on the evening before he was killed?

A. Yes, sir.

Q. Where did you see him first?

A. I saw him at my house.

Q. I wish you would state what he said there about this defendant; just give the conversation.

A. He come to my house, and I was in the kitchen. My wife was in the front room, and he came to my house and asked, did Alberty stay there at night—or stay there, at least—and my wife told him, yes, and he asked where did he sleep at, and she told him—there was a bed right close by the door—and she told him he slept in that bed. He
76 wanted to know what time of night he came in, and she told him, "Sometimes he comes in early and sometimes late, and sometimes he don't come in at all." She asked him why, and he says, "Oh, nothing much very particular, only I would just like to know," and she spoke then and says, "Well, is there any fuss, anything occurred?" and he said, "No, not particular, only he had passed some words about me," something respecting that regard, and then I came out and asked him what was the matter. I seen he was drunk. I came out and asked him what was the matter, and he made the same remarks to me. I says, "Phil, you are not going to have any fuss here in my yard," just that way, and he said, "No; I won't have no fuss in your yard, but," he said, "I will see him, I will find him, and I will see him to-night." Just remarks like that, and stepped out at the gate and went off.

Q. Was there anything said in that conversation at any time about Ed Alberty's wife?

A. No, sir; I don't recollect anything that was said about his wife. If there was it was——

Q. Was there anything said about a pistol?

A. No, sir; I don't recollect anything about a pistol.

Q. Where did you see him next that night? Was he in the habit of coming to your house? Was Phil Duncan in the habit of coming about where Alberty was?

A. No, sir; he was not in the habit of coming to my house at all.

Q. Did you know of trouble between them at that time?

A. No, sir; I don't know exactly——

Q. I mean had you heard of trouble between them?

A. I had heard of troubles.

Q. But you had never seen anything?

A. No, sir; I never seen anything.

Q. You needn't tell what you heard. Where did you see Dun-
77 can next?

A. The next I saw him I saw him standing out at an old building—there used to be an old store that belonged to Mrs. Lipe——

Q. I mean that same night.

A. Yes, sir; that same night.

Q. Was that the night of the killing?

A. Yes, sir. There was an old store where we used to hold church at, and that is the place I seen him after I seen him at my house.

Q. What did you see there at the church?

A. After church was dismissed I stepped to the door. I was standing in the door (which I always seen to the lights being put out, for, of course, I was deacon of the church, and I had to see about lights being put out), and I had got all the lights put out, and I had come to the door, and I was standing in the door, and Joe Ross and Bill Ross was standing right on the corner, I guess as far as from here as to that table over there [indicating about 15 feet], and this Phil Duncan wasn't with them at the same time; and so Phil walks up and lays his hands, one on Bill Ross's shoulder and one on Joe Ross's shoulder, and says like this—now, I won't be positive if it was Phil Duncan that spoke the words, but I do know this one thing I heard was certainly spoke betwixt one of the two—he walks up to Joe Ross and asked him for his pistol. I heard remarks made when they cussed; of course, that drawed my attention, and I listened to what was said, and one of them said, "I want to borrow your pistol"—said that to Joe, and Joe said, "What do want with it?" He said, "That God damned Ed Alberty has been talking about me to his wife, and I am going to fix it." As I said, I won't be positive it was Phil said it, but from the sound of the voice I thought it was Phil said it.

Q. There was the three there, was there?

78 A. Yes, sir; the three was standing together. Joe Ross was standing on this side [indicating] and Bill Ross standing like this [indicating], and he walks up and lays his hands on their shoulders. These remarks were made, and from the sound of the voice I took it to be Phil, but I won't be positive that it was Phil; but that remark was made there in that crowd of the three.

Q. Joe Ross spoke up—at least, you heard Joe Ross speak up and say, "What do you want with the pistol?"

A. Yes, sir; and when he said that he said, "No, you can't get my pistol; that woman is that man's wife, and now you all let her alone." And this man Phil turns around and walks off; goes on that side [indicating], I think, and started like he was going up towards Mrs. Lipe's, and I never saw him any more after that until the next day.

Q. Were you present at any time down at the barber shop when they had trouble down there?

A. No, sir.

Cross-examination by the DISTRICT ATTORNEY:

Q. What relation are you to Ed Alberty?

A. None at all.

Q. Is your wife any relation?

A. No, sir.

Q. How long had Alberty been living at your house?
A. I judge it to be somewheres along about three years.
Q. Where was his wife living?
A. His wife had been staying there, but she had moved up to Mrs. Lipe's.
Q. Hadn't they had a falling out?
A. Yes, sir; as far as I can understand. I won't be sure, but it seems to me they had a little falling out.
79 Q. They were not friendly?
A. Yes, sir.
Q. They were not living together at that time?
A. No, sir; they were not living agreeable, it seems.
Q. Wasn't living agreeable?
A. No, sir.
Q. Wasn't Ed Alberty living with another woman?
A. No, sir; not as I know of.
Q. Hadn't he been?
A. Not that I know of.
Q. Ed was staying at your house; been living there for three years?
A. Yes, sir; him and all his children.
Q. Where is Joe Ross?
A. He lives four miles from Gibson.
Q. Where is he now?
A. He is at Gibson; there at home.
Q. Who else was in that crowd there that night besides Phil Duncan?
A. Joe Ross and Bill Ross.
Q. Where is Bill Ross?
A. He is dead.
Q. What time of night was that?
A. I would judge it to be about 10 o'clock, I think; betwixt 9 and 10; somewhere along there. It was after meeting dismissed.
Q. Have you ever been arrested?
A. No, sir.

Witness excused.

80 RACHEL GRAVES, having been duly sworn upon behalf of the defendant, was examined in chief by Mr. William M. Mellette, and testified as follows, to wit:

Question. What is your name?
Answer. Rachel Graves.
Q. You are the wife of Thomas R. Graves?
A. Yes, sir.
Q. Do you know Ed Alberty?
A. Yes, sir.
Q. Did you know Phil Duncan?
A. Yes, sir.
Q. Did you see Phil Duncan the night before he was killed?
A. I saw him just before sundown; he come to my house. He asked me where Mr. Alberty slept, and I showed him where he slept, and I told him sometimes I have company and he sleeps on the floor; and he asked me what time he come, and I told him it was late some nights he

come in, and some nights it wasn't. I asked him what was he going to do, and he said I would see the next morning.

Q. He said you would see the next morning?

A. Yes, sir.

Q. Did he say anything about a pistol?

A. He asked for a pistol.

The COURT. Don't lead her; just let her state what was said.

The WITNESS. He asked for a pistol; he asked did my husband have one, and I told him no, he had no pistol.

Mr. WILLIAM M. MELLETTE (of counsel for defendant). Did you see him any more before he was killed?

A. I saw him when he was in the church.

Q. You were at church that night, and saw him there?

A. Yes, sir.

Q. Where was your husband when he came there at that time?

A. He was in the kitchen.

Q. You showed Duncan where Ed Alberty slept?

81 A. Yes, sir; he asked me where did I sleep, and I showed him the room where I slept.

Cross-examination by the DISTRICT ATTORNEY:

Q. Phil was a great friend of yours, wasn't he?

A. He never was in my house before.

Q. He didn't visit you?

A. No, sir.

Q. Ed Alberty lived with you?

A. Yes, sir; he lived with me.

Q. He had been living there how long?

A. I don't know how long it was he lived with us, but he had been living with us a good while, him and his wife both.

Q. You say you showed him where he slept when you had company?

A. Yes, sir.

Q. Did you show him where he slept when you didn't have company?

A. Yes, sir.

Q. You showed him both places?

A. Yes, sir.

Witness excused.

82 NORA SANDERS, having been duly sworn upon behalf of the defendant, was examined in chief by Mr. William M. Mellette, and testified as follows, to wit:

Question. What is your name?

Answer. Nora Sanders is my name.

Q. Where do you live?

A. I live at Wagoner now. My home is in Ft. Gibson.

Q. Who is your husband?

A. Tucksy Sanders.

Q. Do you know Ed Alberty?

A. Yes, sir; I do.

Q. Did you know Phil Duncan?

A. Yes, sir.

Q. Did you ever see Phil Duncan about your house when Ed Alberty was there?

A. He was there one night.

Q. What was Ed Alberty doing there at your house?

A. Ed Alberty staid with me; staid in the house with me and my husband.

Q. Do you remember what Ed and your husband had been doing there that night?

A. They hadn't been doing anything.

Q. You don't know how Ed happened to come there that night, then?

A. Ed staid right there with me.

Q. Staid right there?

A. Yes, sir; in my house, with me and my husband.

Q. Do you mean he staid there all the time?

A. Yes, sir; he lived with us awhile.

Q. Where else did he live at that time?

A. He lived with his wife when they were together.

Q. How about Graves—Thomas R. Graves? Did he stay down there, too?

A. I don't know whether he ever staid at Mr. Graves' or not.

Q. You don't know about that?

A. No, sir.

83 Q. What did Phil Duncan do when he came there that night?

A. He was drunk when he came there that night.

Q. Did he have any arms?

A. Yes, sir; he had a pistol.

Q. Where?

A. He had it in his hand.

Q. What was he doing?

A. He stood out by the back door with the pistol in his hand, and we all got afraid of him and run off and left him.

Q. He was out at the back door with a pistol in his hand?

A. Yes, sir.

Q. Who was he calling for?

A. I never heard him call for anyone, because I run out of the house.

Q. You run off?

A. Yes, sir; I run off—I run clean off.

Q. Where did you go?

A. I went across the road apiece, to Sam Steadman's house.

Q. What made him come to your house then?

A. He come there off and on. I don't know what made him come there that night. I could not tell you what made him come there that night?

Q. Did you have any children?

A. Yes, sir; I had one child.

Q. Did you take the child with you?

A. Yes, sir; I took all the children I had out of the house and left it.

Q. Did you see him or hear him shoot that night?

A. No, sir; he may have shot, but he didn't shoot there at the house.

Q. He didn't shoot while you were there?

A. No, sir; he didn't shoot while I was there at all.

Q. How far did you live from the barber shop?
A. Well, I could not tell you just exactly; I lived right upon a little hill.
Q. Do you remember of any trouble down at the barber shop?
A. No, sir; I don't know anything about the troubles outside of my house at all.
84 Q. Your husband is dead, is he?
A. Yes, sir.
Q. Didn't your husband and Ed Alberty belong to a string band and play together?
A. Yes, sir.

Cross-examination by the DISTRICT ATTORNEY:

Q. How long had Ed been living with you all at this time?
A. I think he had been living with us a little over a year.
Q. Sleeping there every night?
A. Yes, sir; slept there every night when he didn't sleep out somewheres else.
Q. How often did he sleep at someone else's?
A. I could not tell you that.
Q. Who was he sleeping with at that time?
A. Well, I don't know that, either.
Q. Didn't he have another woman?
A. I could not tell you that, either; I could not tell you what he had.
Q. But he made your house his home?
A. Yes, sir.
Q. For about a year before this killing took place?
A. Yes, sir; he made my house his home; I cooked for him every day.
Q. Where were his children?
A. If I am not mistaken, I think Aunt Mandy Foster had his children.
Q. This time you speak of about his being there with a pistol was how long before Phil Duncan was killed, at the time Phil was there?
A. About a week, I think.
Q. You don't know who Ed was sleeping with when he wasn't at your house?
A. No, sir; I don't know anything about that at all.
Q. What time in the night was it that Phil came there that night
85 with a pistol?
A. It was just directly after dark, just about good dusk.
Q. What did he say or do when he came there?
A. He never said a word. I tried to get him in the house, and he wouldn't come in the house.
Q. How did you know he had a pistol?
A. He had the pistol in his hand when he came to the back door?
Q. He was drunk, was he?
A. Yes, sir; he was drunk.
Q. You tried to get him in and he wouldn't come in?
A. Yes, sir; he wouldn't come in, and I had got a little afraid of him, and I had one little child six months old, and I jerked up my children and we all ran out of the house.
Q. You all ran?
A. Yes, sir.
Q. Ed and your husband, too?

A. Yes, sir; Tucksy and a girl by the name of Clara Vann was staying with me.

Q. Where did you all go to?

A. Sam Steadman's house.

Q. How long did you stay over there?

A. I could not tell you exactly, but we staid there until we thought he was gone.

Q. All of you staid over there?

A. Yes, sir.

Q. Then where did you go?

A. Went back home and went to bed.

Q. Did you hear any shooting that night?

A. I could not tell you; it has been so long I could not tell you.

Q. There wasn't any shooting into your house that night? There wasn't anybody shot into your house that night?

A. No, sir; they didn't shoot into the house at all.

Redirect-examination by Mr. WILLIAM M. MELLETTE:

86 Q. You don't mean that Ed Alberty went over to Steadman's with you?

A. No, sir; I don't think Ed went there at all; but me and Clara and my husband all went over there.

Recross-examination by the DISTRICT ATTORNEY:

Q. Where did Ed go?

A. I could not tell you where he went.

Q. Did he go out with you?

A. Yes; he left the house. We all left the house together.

Q. Steadman's was right across the street, wasn't it?

A. Yes, sir.

Q. If there had been anybody shot into your house while you were at Steadman's, you could have heard it, could you not?

A. Yes, sir; we could have heard it very easily.

Q. If Ed had a wife, what was he doing staying at your house?

A. Him and his wife were parted.

Q. How long before?

A. I could not tell you how long they had been parted?

Q. Were they parted when he came to your house?

A. Yes, sir; they were parted when he came to my house.

Redirect-examination by Mr. WILLIAM M. MELLETTE:

Q. You remember it was at Graves's that his children were staying at that time?

A. No, sir; I could not tell you anything about him staying at Mr. Graves at all.

Witness excused.

87 JIM SMITH, having been duly sworn upon behalf of the defendant, was examined in chief by Mr. William M. Mellette, and testified as follows, to wit:

Question. What is your name?

Answer. Jim Smith.

Q. Where do you live?

A. I live in Muskogee.

Q. Were you living at Ft. Gibson at the time that Phil Duncan was killed?

A. Yes, sir.

Q. Just before the killing, I will ask you if you know of this man, Phil Duncan, making any assault upon Ed Alberty at the barber shop?

A. He came in there and run us all out of there one night.

Q. What with?

A. He had a knife.

Q. Did he come at any other night except that night with a knife?

A. That is the only night I remember there in the shop.

Q. Do you remember of hearing a pistol shot there at the shop one night?

A. Yes, sir; that was the night I ran out; that he ran us out of there the same night.

Q. What were you doing in there?

A. We were practicing there—playing music.

Q. String band?

A. Yes, sir.

Q. What kind of a knife did he carry?

A. It was a long knife; about that long, I guess [indicating about 6 inches]; kind of a dirk knife.

Q. Where were you when you heard the pistol shot?

A. I was close to home then; going home.

Q. Where had you gone from?

A. From the barber shop.

Q. Had you run from the barber shop?

A. Yes, sir.

88 Q. What made you run?

A. He came in there and told us all to get out—with a knife in his hand—and I got out.

Q. Where was Ed Alberty?

A. Ed came out ahead of me; we were all playing, but I don't remember where he went—I don't know whether he came out first or not.

Q. He was in there?

A. Yes, sir; *me* and Ed and Tuck Sanders played music together. We had a dancing club there, and we played for them every week, and we practiced in the barber shop.

Q. You don't know which way Ed ran, then?

A. No, sir.

Q. You went towards home?

A. Yes; I went on home.

Q. What was the trouble between Duncan and Ed?

The DISTRICT ATTORNEY. He has not said there was any trouble between them.

Mr. WILLIAM M. MELLETTE (of counsel for defendant). Was there at that time?

A. He just came in where we were playing. I don't know whether him and Ed had any trouble or not. He came in where we were playing.

Q. He didn't have anything against you, did he?

A. Yes, sir; Tucksy and a girl by the name of Clara Vann was staying with me.

Q. Where did you all go to?

A. Sam Steadman's house.

Q. How long did you stay over there?

A. I could not tell you exactly, but we staid there until we thought he was gone.

Q. All of you staid over there?

A. Yes, sir.

Q. Then where did you go?

A. Went back home and went to bed.

Q. Did you hear any shooting that night?

A. I could not tell you; it has been so long I could not tell you.

Q. There wasn't any shooting into your house that night? There wasn't anybody shot into your house that night?

A. No, sir; they didn't shoot into the house at all.

Redirect-examination by Mr. WILLIAM M. MELLETTE:

86 Q. You don't mean that Ed Alberty went over to Steadman's with you?

A. No, sir; I don't think Ed went there at all; but me and Clara and my husband all went over there.

Recross-examination by the DISTRICT ATTORNEY:

Q. Where did Ed go?

A. I could not tell you where he went.

Q. Did he go out with you?

A. Yes; he left the house. We all left the house together.

Q. Steadman's was right across the street, wasn't it?

A. Yes, sir.

Q. If there had been anybody shot into your house while you were at Steadman's, you could have heard it, could you not?

A. Yes, sir; we could have heard it very easily.

Q. If Ed had a wife, what was he doing staying at your house?

A. Him and his wife were parted.

Q. How long before?

A. I could not tell you how long they had been parted?

Q. Were they parted when he came to your house?

A. Yes, sir; they were parted when he came to my house.

Redirect-examination by Mr. WILLIAM M. MELLETTE:

Q. You remember it was at Graves's that his children were staying at that time?

A. No, sir; I could not tell you anything about him staying at Mr. Graves at all.

Witness excused.

87 JIM SMITH, having been duly sworn upon behalf of the defendant, was examined in chief by Mr. William M. Mellette, and testified as follows, to wit:

Question. What is your name?

Answer. Jim Smith.

Q. Where do you live?

A. I live in Muskogee.

Q. Were you living at Ft. Gibson at the time that Phil Duncan was killed?

A. Yes, sir.

Q. Just before the killing, I will ask you if you know of this man, Phil Duncan, making any assault upon Ed Alberty at the barber shop?

A. He came in there and run us all out of there one night.

Q. What with?

A. He had a knife.

Q. Did he come at any other night except that night with a knife?

A. That is the only night I remember there in the shop.

Q. Do you remember of hearing a pistol shot there at the shop one night?

A. Yes, sir; that was the night I ran out; that he ran us out of there the same night.

Q. What were you doing in there?

A. We were practicing there—playing music.

Q. String band?

A. Yes, sir.

Q. What kind of a knife did he carry?

A. It was a long knife; about that long, I guess [indicating about 6 inches]; kind of a dirk knife.

Q. Where were you when you heard the pistol shot?

A. I was close to home then; going home.

Q. Where had you gone from?

A. From the barber shop.

Q. Had you run from the barber shop?

A. Yes, sir.

88 Q. What made you run?

A. He came in there and told us all to get out—with a knife in his hand—and I got out.

Q. Where was Ed Alberty?

A. Ed came out ahead of me; we were all playing, but I don't remember where he went—I don't know whether he came out first or not.

Q. He was in there?

A. Yes, sir; *we* and Ed and Tuck Sanders played music together. We had a dancing club there, and we played for them every week, and we practiced in the barber shop.

Q. You don't know which way Ed ran, then?

A. No, sir.

Q. You went towards home?

A. Yes; I went on home.

Q. What was the trouble between Duncan and Ed?

The DISTRICT ATTORNEY. He has not said there was any trouble between them.

Mr. WILLIAM M. MELLETTE (of counsel for defendant). Was there at that time?

A. He just came in where we were playing. I don't know whether him and Ed had any trouble or not. He came in where we were playing.

Q. He didn't have anything against you, did he?

A. No, sir; I don't think he did.
Q. You don't know if he had anything against Tuck Sanders?
A. No, sir.

Cross-examination by the DISTRICT ATTORNEY:

Q. Who was he talking to when he came in there?
A. He just came in and told us all to get out.
Q. He had his knife in his hand?
A. Yes, sir.
89 Q. Did you see him with a pistol that night?
A. No, sir; I didn't see him with any pistol.
Q. Was he drunk?
A. He seemed to be drinking.
Q. Whose barber shop was it?
A. Tuck Sanders'.
Q. And you all got out?
A. Yes, sir.
Q. How long was it after you got out before you heard the pistol shot?
A. I don't know. It wasn't very long. I guess I had gone a good ways before I heard the shot. I was close to home. I lived about half a mile from the shop.
Q. He wasn't any more after one of you than he was after the other, was he?
A. He didn't seem to be. I got out as quick as I could when he came in.
Q. He didn't seem to be after any particular one?
A. No, sir.

Witness excused.

90 ABE DAVIS, having been duly sworn upon behalf of the defendant, was examined in chief by Mr. William M. Mellette, and testified as follows, to wit:

Question. What is your name?
Answer. Abe Davis.
Q. Where do you live?
A. Ft. Gibson.
Q. How long have you lived there?
A. I have been there ever since during the war.
Q. Do you know Ed Alberty?
A. Yes, sir.
Q. Did you know Phil Duncan?
A. Yes, sir.
Q. Do you remember of Phil being killed there at Ft. Gibson?
A. Yes, sir.
Q. I will ask you if you know of Phil making any assault on this man at the barber shop—at Tuck Sander's barber shop?
A. I remember one time, a time or two there, that he run them out of there. I went there one time and he had already run them out.
Q. Where was Phil Duncan?
A. He was in the barber shop at that time when I went there.
Q. What did he have?

A. He had a pistol at that time.
Q. Where was Ed Alberty at that time?
A. I didn't see him. They were out. There wasn't anyone in there but him.
Q. There wasn't anybody in there but Phil?
A. No, sir.
Q. How did you know he run them out?
A. I just heard that he did. I don't know that he did.
Q. Had you heard them playing in there before that?
A. No, sir; I hadn't heard them, but I heard others say that they had been practicing.

91 Q. Was there any shooting there that night?
A. I heard some shooting before I got there.
Q. Where did you find Phil when you got there?
A. He was in the barber shop.
Q. Where did he have his pistol?
A. I disremember; it has been so long that I don't remember what position he had it in, or how he was, or anything of the kind.
Q. Did he have it out or in his scabbard?
A. I just don't remember; I remember of seeing the pistol, but I don't know what position he had it in.
Q. You don't remember the position he had it in?
A. No, sir.
Cross-examination waived. Witness excused.

92 JIM SMITH, being recalled, was further cross-examined by James F. Read, esq., the district attorney, as follows, to wit:

Question. Who was in that band besides you?
Answer. Me and Alberty and Tucksy Sanders.
Q. You three?
A. Yes, sir.
Q. Did Phil ever run you out of there more than once?
A. Yes, sir.
Q. How often?
A. Two or three times.
Q. He made a habit of doing it, then?
A. Yes, sir.
Q. What kind of weapons did he carry?
A. He generally had a knife—generally all the time.
Q. Carried a knife all the time?
A. Yes, sir.
Witness excused.

93 SANK VANN, having been duly sworn upon behalf of the defendant, was examined in chief by Mr. William M. Mallette, and testified as follows, to wit:

Question. What is your name?
Answer. Sank Vann.
Q. Where do you live?
A. Ft. Gibson.

Q. Do you know Ed Alberty?
A. Yes, sir.
Q. Did you know Phil Duncan?
A. Yes, sir.
Q. Did you see Phillip Duncan on the night he was killed?
A. Yes, sir.
Q. Where did you first see him?
A. I saw him at the church house in Ft. Gibson.
Q. Did he make any statement to you that night about where he was going?
A. Yes, sir; he did.
Q. Where did he say he was going?
A. He told me after church broke that he was going down to Mrs. Lipe's.
Q. Who was he going to see?
The COURT. Let the witness state what he said. Don't lead him.
The WITNESS. He said he was going to see Mandy.
Mr. WILLIAM M. MELLETTE (of counsel for defendant). What did you do with him?
A. I told him not to go down there, he might get into trouble.
Q. What did you do?
A. I taken him away from there.
Q. Where did you go with him?
A. I taken him up against where Tuck Sanders lived, and told him to go on home, and he promised me that he would. I went home. I don't know where he went from there.

94 Cross-examination by the DISTRICT ATTORNEY:

Q. What did you think he would get into trouble about?
A. After he told me that he was going down there to see Mandy, that was Ed's wife, and I knew that Ed was there, and he was accused of Ed's wife.
Q. Don't you know that Ed and his wife had separated?
A. Yes, sir; they had separated—at least, they were kind of spatting at each other. I don't know that they were thoroughly separated.
Q. Don't you know they had not lived together for a year?
A. No, sir; I don't know that.
Q. Don't you know that Ed had been living at Nora Saunders's house?
A. No, sir.
Q. For a year before this thing occurred?
A. No, sir; I don't know that.
Q. Have you ever been arrested for anything?
A. Yes, sir.
Q. What for?
A. I was arrested and tried right in this court for murder.
Q. What else were you arrested for?
A. I was arrested for disturbing the peace and tried in the court at Muskogee.
Q. What else?
A. That is all.

Redirect examination by Mr. WILLIAM M. MELLETTE:

Q. Where did Ed Alberty live?

A. I will tell you the fact; it has been so long that I don't remember just exactly where he was living at that time.

Q. Where were his children staying?

95 A. I think they were staying with an old lady by the name of Mandy, if I am not mistaken. I won't be sure. I don't know just exactly where they did live.

Witness excused.

Testimony closed.

96 This was all the testimony offered on either side, and after argument to the jury by the respective counsel, the court charged the jury as follows, the charge being taken by the court stenographer:

97 PARKER, J.:

Gentlemen, the defendant in this case, Ed Alberty, is charged with the crime of murder for having on the 15th day of May, as alleged in the indictment, in the year 1879, in the Cherokee Nation, willfully and of his malice aforethought taken the life of Phil Duncan by shooting him with a pistol. The proof shows that the killing was done in the year 1880 instead of 1879. I believe the witnesses testified it was 1880.

The DISTRICT ATTORNEY. Yes, sir; they testified it was in 1880.

The COURT. That variance between the allegation in the indictment and the proof as to the time when the killing occurred is immaterial.

Now, of course, there are certain duties confronting you to be executed by you as jurymen, and before you can execute them properly you
98 are to know what this charge is, what is involved in it, and then you are to take the testimony in this case and the law given you by the court, and make an application of that law to the truth of the case as you find it, and thus to solve the problem imposed upon you by the oath you have taken.

JURISDICTION.

The first proposition confronting you, and upon which you are to pass, as a question of fact, is the question of jurisdiction—that is, the right of the jury and the court to hear and determine the case upon its merits. The indictment in this case alleges that Phil Duncan was a negro and not an Indian. You have heard the proof bearing upon the proposition of the parentage of Phil Duncan. You have heard the evidence which has been offered before you for the purpose of showing that Duncan, the deceased, was born of a slave mother, in the Choctaw Nation; that he was born there while slavery existed under the Government of the United States. That of itself would cause Duncan to partake, if he was alive, and did when he was alive, of the status of his mother—that is to say, if she was a colored person, and she had lived to obtain her freedom, she would be a citizen of the United States. She was a jurisdictional citizen even in slavery, entitled to the protection of the laws of the United States, and so was her offspring. That is one reason why the deceased would partake of the status of the mother, because the principle of the law is that persons who are born in a state of servitude follow

the condition of the mother and not the condition of the father." The status of persons born in a state of freedom is regulated by a rule directly the opposite. They follow the status of the father and not the status of the mother. Both of these rules started at a very early age of the law. They both originated from the Roman law, and started at the same time, as regulating the status of these two classes of people. I say that is one reason, then, why in this case Phil Duncan was a jurisdictional citizen of the United States, because he took the status of his mother. There is an additional reason. The proof in this case shows that he was a natural child, or, as we commonly call such persons, a bastard child. He was begotten out of lawful wedlock. The rule of law is that a child begotten in that way follows not the status of the father, but the status of the mother. That is upon the idea that the mother is ascertained, and it is sometimes difficult to ascertain the father in order that the status of the child could be fixed. Then we have two legal reasons why he partook of the status of the mother. It is true that Choctaw colored people now, those of them who were born in that country, or were in there at a certain time, after the treaty, have become citizens of the Choctaw Nation; but that was by operation of a law of Congress and the law of the Choctaw Nation, which laws have both been passed since the death of Phil Duncan, and of course the law did not operate upon him, for he was not in being at that time. Upon that state of facts, gentlemen, you would be authorized to find that because Phil Duncan, the deceased, was a jurisdictional citizen of the United States that this court has jurisdiction to try this defendant upon this charge.

DEATH AND NAME OF DECEASED.

That then makes it necessary for us to proceed to ascertain what principles of the law are to be given you as touching the merits of this case, as going to enable you to ascertain whether or not a crime has been committed by this defendant; and if so, what the character of that crime is. The first proposition along that line required to be found by you is that Phil Duncan, the deceased in this case, is dead. When speaking of the name of the deceased, as the proof shows that he was usually known by the name of Phil Duncan, that is sufficient. That may not have been expressive of his full name, but if he was known by that name, as stated by the witness, his brother-in-law, that is sufficient as to the name. You are to first find, then, that he is dead; and secondly, that he died because he was shot with a pistol. Now, these are all matters, of course, of inference. And you take the statements of witnesses who saw him after he was dead as evidence that he is dead. And you take the fact that he died because he was shot with a pistol; you find it as an inferential fact, as a matter of inference, as a conclusion drawn from the circumstances. If he was in health before he was shot, and injured to a great extent, and died shortly afterwards, these are facts that men would ordinarily take into consideration and regard them as being sufficient to warrant them in coming to a conclusion that that shooting was the cause of his death. You may find it in like manner as jurors. If you find that proposition beyond a reasonable doubt, then in addition you are required to find that he was shot by the defendant; that the defendant did the act in the shape of shooting which caused the

death of the deceased. And for that reason it may be said, if you find that state of case existing, that the defendant killed the deceased Phil Duncan. That is a proposition to be found.

THE THREE CONDITIONS ENTERING INTO THE CHARGE.

If you find these things I have enumerated, you have a state of case that brings us to the proposition where we are required to inquire into the character of that killing, the circumstances surrounding it, in order that we may be enabled to characterise it, because there are
101 two duties which are imperative upon you, and one as imperative as the other. The first is to find if a crime has been committed, and then the duty is equally imperative upon you to correctly characterise that crime—to correctly name it—whatever it may be under the principles of the law as given you by the court. Whatever that crime may be, if it be a crime, it is your duty to speak it out in your verdict—to correctly name it in your verdict. To do that you must have the characteristics of these crimes growing out of the taking of human life. There are but three conditions which can grow out of the taking of a human life under the law of the United States. One is a condition which the law calls murder. The other is a condition which the law calls manslaughter. The other is a condition which the law recognizes as being an excusable homicide, or a justifiable homicide, as the terms are now indiscriminately used in the law. Because there are three conditions, to arrive at greater certainty, if the condition, for example, of self-defense had not been invoked in the case, it would be better upon the part of the court to give that condition, because when you have all three of these conditions before you you can the better classify the act of the defendant—the better place it under the classification where it belongs.

THE CONDITION WHERE MURDER EXISTS.

To find the crime of murder, in addition to these things I have named, such as the death of the deceased, Phil Duncan, and that he died by violence of the kind named in the indictment, and the infliction of that violence by the act of the defendant, you are required to find that the defendant inflicted that violence willfully and with malice aforethought.

If you find that state of case you can not find anything else
102 but murder. But these expressions, which are the characteristics of the crime of murder, have legal meanings attached to them. They have definite meanings, and meanings which are precise in the law. Therefore we must know how the law defines them in order that we may understand that crime, because it is by the law and evidence you are to try the case—that you are to solve the problem. The evidence which is truthful, and which goes to establish a state of truth, is what constitutes the facts in the case which are worthy of your consideration, and which you must consider.

DEFINITION OF THE WORD "WILLFUL."

The word "willful" has a meaning in the law. It means "intentional," and not "accidental." It means that if a man intentionally

does an act which kills—an act the result of which is death—the law recognizes the fact that that death is intentional; and if it is intentional it is willful, because that is the meaning of the word as used in this connection. Now, in order that we may the better understand the force of this expression, we will look for a moment at the meaning of the word "accident," because, as I have already told you, "willful" means "intentional," and not "accidental." An accident is something which occurs after a party has used the care exacted of him by the law to prevent its occurrence. The law exacts of us a certain amount of care, especially when it comes to the preservation or protection of human life. It says to us that the care exacted of us is in exact proportion to the character of the danger which may result from our want of care. For example, if a man is handling a dangerous agency—an agency that probably or naturally might produce death if wrongfully or carelessly handled—
103 he is required to exercise the highest possible care under the circumstances—known as reasonable care—because reasonable men, in legal contemplation, do that very thing. If a man exercises that care, and death ensues notwithstanding, that is an accident. It is in direct contrast with that which is an intentional act. Whenever you find a state of case which can not be classified as an accident it must necessarily fall under the other classification. Now, the classification of acts known as intentional acts embraces a case where a party has a specific purpose to do a thing, as well as a case where a result may be produced because of gross negligence or gross carelessness. If a man presents a deadly weapon at another, such as a pistol, within shooting distance of that other, and fires upon him, accompanying that act of firing, or immediately preceding it, by a declaration of a purpose to kill, you have presented to you facts which would ordinarily satisfy a reasonable man that the party was doing an act intentionally, and consequently a willful act. Whenever you have that state of case you are to bring to bear in that connection the rule of law which recognizes that there is an intimate connection between an act of that kind and death; and because of that intimate connection, because death usually follows from an act of that kind, the law says—it being true that every man is held to have intended the necessary, natural, and probable consequences of what he does, if one intentionally does an act which may produce death—you are to find that he intended to produce it, and to find that, intending to produce it, if it follows as an effect from his act, he willfully produced it, because, as I have told you, "intentional" means "willful." Now, here is a principle of the law, enunciated in the case of Commonwealth v. York, by Chief Justice Shaw, a very eminent jurist, and a principle which is recognized everywhere in looking for this condition of willfullness,
104 or as to whether or an act was done willfully, where he said:

"A sane man, a voluntary agent, acting upon motive, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. If, therefore, one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended so to destroy such person's life. So, if the direct tendency of the willful act is to do another some great bodily harm, and death in fact follows as a natural and probable consequence of the act, it is presumed that he intended such consequence, and he must stand legally responsible for it.

So, where a dangerous and deadly weapon is used with violence upon the person of another, as this has a tendency to destroy life, or to do some great bodily harm to the person assailed, the intention to take life, or to do him some great bodily harm, is a necessary conclusion from the act."

That tells you, in so many words, that you take the act as done, first finding out whether it was an act as executed which might naturally and probably produce death, and if it was willfully done, according to the definition of that term as I have given it to you, and when you find that, and you find that death ensued from the execution of that act, you necessarily find, from the act as done, that the party intended to kill, and, consequently, that he willfully killed. In short, you take into consideration the act, and when I speak of your taking that into consideration I mean that you take into consideration the weapon used, the manner of its use, the character of that weapon, the result produced by it, and any other surrounding facts and circumstances indicating a purpose upon the part of the defendant to execute a deadly result, or to bring about
105 a deadly result, in the shape of words, in the shape of threats made at the time, in the shape of a declaration immediately followed by the act of firing; these are all means by which you are to arrive at the conclusion as to whether or not the firing was willful upon the part of the defendant; and if the firing was willful, and death followed from it, you are to find that the act was willful.

DEFINITION OF THE TERM "MALICE AFORETHOUGHT."

Now, it is a principle of the law that if a killing is willfully done, and there is nothing in it to bring it under the law of self-defense, nor is there anything in it to mitigate the crime—that is, to reduce the grade of it from murder to manslaughter—whenever the proof shows it was done willfully, and done in the absence of either one of these conditions I have named, the same evidence would show it was done with malice aforethought. Why? Because "malice aforethought" is defined by the law, according to one definition, as the doing of a wrongful act without just cause or excuse, or in the absence of mitigating facts, which act produces death. Now, let us read the definition as given by the court which tried the Guiteau case. It is very brief, and will not take much of our time, and it is given more concisely than I could give it without writing it, and it tells us exactly what is meant by the term "malice aforethought." It is stated in other forms, all through the decided cases, and I will read some of those to you also presently. The court in charging the jury in the Guiteau case said:

"It must be further shown that it was caused with malice aforethought, but this does not mean that the Government must prove any special spite, ill will, hatred, or grudge on the part of the prisoner towards the deceased. Whenever a homicide is shown to have been committed without lawful authority, and with deliberate intent, it is sufficiently proved to have been done with malice aforethought."
106

He says "whenever it is proven to have been committed without lawful authority"—that is, not under the law of self-defense—"and with deliberate intent"—of course, if it is done with deliberate intent there is no manslaughter in it—"it is sufficiently proved to have been committed with malice aforethought."

He continues:

"And this evidence is not answered, and malice is not disproved, by showing that the accused had no personal ill will against the deceased."

That means, if a man kills, and he does it without just cause or excuse, or in the absence of mitigating circumstances, it does not make any difference whether he had special spite, grudge, or ill will against the party killed or not. If he did have, if he was acting from a spirit of jealous hatred, a bitter animosity arising from a spirit of jealousy or anything else, and killed because of that, that it is evidence of malice aforethought, because it is evidence of special spite, of a grudge, of a desire to satisfy an ill will against the party killed. And whenever a killing occurs because of that mental condition, it implies that the party premeditated it, that he thought of it beforehand, that he contemplated the purpose to slay. That is why it is said by the law that a killing growing out of special spite, grudge, or ill will entertained by a party, and there being no justification or mitigating in it, shows the existence of malice aforethought; and you may use that as an evidence of the existence of this attribute of murder named "malice aforethought."

There are other definitions of "malice aforethought," as I have already told you, and how you may find it. I read to you now from the case of Lander v. The State, Horrigan & Thompson's Cases of self-
107 defence, where it was said:

"When the law makes use of the term 'malice aforethought' as descriptive of the crime of murder it is not to be understood merely in the sense of a principle of malevolence to particulars"—that is, of hatred growing out of special acts—"but as meaning that the fact has been attended by such circumstances as are the ordinary symptoms of a wicked and malignant spirit. Malice, in its legal sense, denotes a wrongful act done intentionally, without just cause or excuse. The legal import of the term, it has been said, differs from its acceptation in common conversation. It is not, as in ordinary speech, only an expression of hatred and ill will to an individual, but means any wicked or mischievous intention of the mind. Thus, in the crime of murder, which is always stated in the indictment to be committed with malace aforethought, it is neither necessary in support of said indictment to show that the prisoner had any enmity to the deceased, nor would proof of the absence of ill will furnish the accused with any defense, when it is proved that the act of killing was intentional, and done without justifiable cause. Malice, in law, is a mere inference of law, which results simply from a willful transgression of the law. It imports simply the perverse disposition of one who does an act which is wrongful, without sufficient legal excuse therefor; and the precise and particular intention with which he did the act, whether he was moved by anger, hatred, or a desire for gain, is immaterial. He acts maliciously in willfully transgressing the law."

Further upon that line, taking the law as declared by the court in the case of U. S. v. King, a case tried recently in the southern district of New York by Federal Judge Lacomb, where he said:

108 "Malice is an intention to do bodily harm, a formed design to do mischief. It has also been defined as a deliberate intent to kill. It does not necessarily import any especial malevolence towards the individual slain, but also includes the case of a generally depraved,

wicked; and malicious spirit, a heart regardless of social duty, and deliberately bent on mischief. It imports premeditation, therefore there must logically be a period of prior consideration; but as to the duration of that period no limit can be arbitrarily assigned. The time will vary as the minds and temperaments of men, and as do the circumstances in which they are placed. The human mind acts at times with marvelous rapidity. Men have sometime seen the events of a lifetime pass in a few moments before their mental vision. Thought is sometimes referred to as the very symbol of swiftness. There is no time so short but that within it the human mind can form a deliberate purpose to do an act, and if the intent to do mischief to another is thus formed as a deliberate intent, though after no matter how short a period of reflection, it none the less is malice. Malice is an intent of the mind and heart."

This tells you now how you may find it.

"There is never presented to a jury direct evidence of what was the intent of the man's heart at the time. He is the only possible direct witness to that, and if he meant so to testify he would plead guilty. The existence or nonexistence of malice is an inference to be drawn by the jury from all the facts in the case. The emotions of the heart, the processes of the mind are, to us, or to anyone outside of the individual, exhibited by the acts which the individual performs, and we are entitled to infer what his intent was, what were the processes of his mind and
109 the feelings of his heart, by a careful study of the acts which he performs, and all the other external indications which he may have given of what his state of mind and heart was. As an eminent text-writer has put it, there is no case of malicious homicide in which malice is not inferred from attendant circumstances, no case in which it is demonstrated as express. We have no power to ascertain the certain conditions of a man's heart. The best we can do is to infer his intent more or less satisfactorily from his acts. A person is presumed to intend what he does. A man who performs an act which he knows will produce a particular result is, from our common experience, presumed to have anticipated that result, and to have intended it. Therefore, we have a right to say, and the law says, that when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed for any definite period before the fatal blow. From the very fact of a blow being struck we have the right to infer, as a presumption of fact, that the blow was intended prior to the striking, although at a period of time inappreciably distant."

Now, in this connection, let me remark to you that every man is held to know the nature of a deadly weapon. He is held to know the effect it produces when used in a certain way. And when he uses a weapon of that kind in a certain way, if the proof shows it was intentionally used, the law holds him, as I have already told you, to have intended the result produced by it. If that result is death, the law says he intended that death. Then you look further, to see if it was a state of case where he could prepare to use that weapon in that way under the law of self-defense, as I will give it to you presently. If it was not, then you are to look again to see whether there are, under the law, such mitigating facts as can be considered by you, under your oath, to reduce the grade
110 of that crime. If there are not, the fact that it was willfully or intentionally used, in the absence of these two conditions, as I

have already told you, shows a state of case where malice aforethought exists; or, in other words, shows the doing of a wrongful act without just cause or excuse, and in the absence of mitigating facts, which produces death.

"Malice aforethought" is again defined as the doing of an act which results in death, in such a way as to show that he who did it had a heart void of social duty and a mind fatally bent upon mischief. Now, what is meant by that? That has reference, and points out by its very terms, our relation to each other, and our consequent duties to each other. The highest duty we owe to each other is the duty to protect life, unless the man whose life is destroyed forfeits that life. In all cases where he has not done anything under the law which would give us the right to say that he forfeited that life, the duty rests upon us not to destroy, but to protect that life. If we so recklessly and wantonly destroy that life as to show that we have forgotten that duty, that we have permitted it to pass from our minds and to be no longer obligatory upon us, the law says that we then have forgotten our social duty, and the fact that we kill, under such circumstances, shows that we have hearts or minds fatally bent upon mischief. That is a comprehensive definition of malice aforethought, when you for a moment consider our duties to each other. Now, it is true, in connection with these cases, that when you have the proof showing the killing, you also have the circumstances surrounding that killing, as a rule. Sometimes that may happen otherwise, but if so it is an exception to the general rule. You have, for example, in this case, the character of the weapon used; you have the manner of its use as described by the witnesses, and you have these surrounding
111 circumstances attending the deadly result, and it is by these that you are to characterize that result, to see whether it is a crime or not, and then to see what character of crime it is.

This, then, is the classification known as that of murder. It possesses these two attributes. If the taking of the life of Phillip Duncan by the defendant was done in such a way as that these two attributes exist, the crime is murder, and nothing else.

I have now told you what characteristics murder has, and how you may find them. You may find them alone by the circumstances of the killing. You are to look at the killing, to see whether it was wantonly, unnecessarily, and consequently wickedly done—that it was a killing not necessary to be done at that time to protect the life of the defendant under the law as I will give it to you presently. If it was not, then it is a crime of some kind. It falls under one or the other of the classifications, because if it is not defensive it is a crime, under the law of the United States.

THE CONDITION WHERE MANSLAUGHTER EXISTS.

Now, there is another crime, which is called "manslaughter," and it is defined by the statutes of the United States to be the unlawful and wrongful and willful killing of another, without malice aforethought. It is willful—that is, voluntary manslaughter. It is done willfully, but it is done in such a way as that there is out of the killing this attribute of the crime of murder known as "malice aforethought," as I have defined it to you. If that attribute is out of the case, then the killing is manslaughter.

Manslaughter usually arises out of a case where two men are engaged in an affray, in an ordinary fist and skull fight, to use that expression, and in the heat of that fight one of them draws a weapon and takes
112 the life of the other, without having previously prepared himself to wrongfully, illegally, and unjustifiably use that weapon if opportunity offers. If a man enters into an affray with his hands and fists, and he has prepared himself with a deadly weapon with a determination to use it wrongfully and improperly in that affray, that shows deliberation; shows premeditation; shows that he has selected a weapon to use wrongfully. He may select a weapon, and he may wear it, according to the great idea prevailing in this country that we can bear arms as citizens, under certain circumstances, but, as I have told you, if he prepares himself for the purpose of killing wrongfully or improperly, in a way not justified by the law, and while so prepared with such weapon he seeks an occasion in an affray to kill, and does kill, that would not be manslaughter, although it was a killing in an affray. But if he does it without that preparation, suddenly, without having considered the deadly purpose beforehand to be wrongfully executed by him, and in the heat of passion draws a weapon and slays his adversary, that is manslaughter. There is another provocation which, as I will tell you after awhile, reduces the grade of crime to manslaughter. I will say, in this connection, at this time, that if a man kills another in the act of adultery with his wife, while committing the act he slays him, slays him while in the heat of mind engendered by an observation of that character, that is manslaughter. I will give you the law fully, presently, upon the proposition as to when a man may kill and ask to have his crime reduced to manslaughter in a case of adultery. I will simply read the law to you upon that subject.

Now, that is what is meant by manslaughter.

THE CONDITION WHERE SELF-DEFENSE EXISTS.

The other condition, as I have before intimated to you, growing out of the taking of human life, is a state of self-defense; where
113 a party under the law of the United States has the right to kill another; where he can justifiably take life. We are to see what is meant by that. There are two propositions embraced in this law of self-defense, and it is necessary for you to note them with care. Almost every word of these two propositions is pregnant with meaning, and when you take the two propositions together it makes a complete system, when properly applied, for the protection of innocent human life—not guilty human life, but innocent human life—just as the laws of the country are for the same purpose; they are administered for a like purpose; they are enacted for a like design.

THE DOCTRINE OF REAL DANGER.

The first proposition of this law of self-defense embraces a state of case where at the time of the killing by the defendant there was springing from the act of Phil Duncan, the deceased, towards the defendant, real and actual danger to his life, or of great violence to his person which might produce death if that violence was inflicted upon that person, or

produce a permanent or serious injury, such as a maiming, or something of that kind. Now, that must exist at the time of the killing. Not that it might have existed before that time, because if a man has an affray or difficulty with another before the time of the killing, and there is time for the blood to cool, there has intervened a reasonable time between that difficulty and the killing, although the man killed may have been the aggressor in the first difficulty, he can not be killed because the slayer had a difficulty with him before and then claim that he is justified in doing it, or even that his crime is mitigated by it. Whenever there is cool-
114 ing time, as the law says, time according to the ordinary operation of the mind of a man for it to settle down and to subside from a state of passion which may be engendered by the difficulty that he was in with the party slain at some previous time, that difficulty can not be used to excuse or justify under the law of self-defense or to reduce the grade of the crime. If a man kills because of that condition, if that is the reason why he takes life, if he takes it because he may have brooded over the condition that existed as affecting him at the hands of the deceased, that is evidence of deliberation, that is evidence of premeditation, that is evidence that he thought of the killing beforehand, that he contemplated the deadly result. And I say that a difficulty of that kind does not excuse, nor does it mitigate, if it transpired at a period of time beforehand such as was described by the witnesses in this case, if you find there was a difficulty. Now, let us read this proposition, and you will see, as I have told you, that it contemplates that the danger then and there existed. You will understand that this law of self-defense is sometimes called the law of necessity. It is called that for the reason that there are no other reasonable means at hand to enable the party to protect his own life or his person from great violence except the means he uses, except the method to which he resorts. That is why it is called the law of necessity. It is not a law of necessity if a man has been in a difficulty with another beforehand and he kills because of that. He can not justify himself upon that ground, because if there is danger of the recurrence of that difficulty he has time to seek peaceable means for protection instead of resorting to this method which produces a deadly result. Let us see what the law says. This is sometimes called the proposition of real danger, and, of course, when we are undertaking to read
115 to you the law of self-defense in a case of this kind where human life has been taken we mean danger to life or of great violence to the person, and not danger of any slight injury, because you can not kill because of that; you can not weigh a human life in one end of the balance against a slight injury to the person in the other, because that is out of all proportion, while the law of self-defense is a law of proportions. One of the very elements which enables us to recognize it as a law of right and justice is that it is a law of proportions. It is given for the protection of human life against an injury, or a threatened injury, then and there impending and about to fall, and which may destroy human life, or do great violence to the person which might result in death or produce permanent injury. This law says:

"A man who is in the lawful pursuit of his business is attacked by another under circumstances which denote an intention to take away his life, or do him some enormous bodily harm, may lawfully kill the assail-

ant"—When?—"provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him if it be in his power."

When it says that he must be "in the lawful pursuit of his business" it means that he is doing what he had a right to do, that he is in the right himself. It does not mean a state of case where a man is getting another in a position where he can vent his spleen upon him, or where he can take advantage of him, or where he can kill him if he sees proper to do so. That is not a state of case where he is in the right. He is not in the right when he does that; and if the evidence in this
116 case shows that the defendant was prompted by what he said to Mr. Lipe as to the purpose of the deceased in getting into the window by a desire to put the deceased in a position where he would be killed, or would likely be killed by the defendant, or by Lipe under a mistaken state of facts, then the defendant was in the wrong; if that was the motive, if that was the purpose upon his part, he was in the wrong, and he could not set up the law of self-defense; it would not be available to him because he would be contriving for the purpose of securing wrongfully and improperly the taking of human life. He must measurably be in the right with reference to that transaction. That is what is meant by his being in the lawful pursuit of his business. When he is in that condition, if he was in that condition, in this case, and was then attacked by Duncan, the deceased, in such a way as to denote an intention upon the part of the deceased to take away his, the defendant's, life, or to do him some enormous bodily injury, he could kill Duncan—When?—provided he use all the means in his power otherwise to save his own life from the attack of Duncan, or preventing the intended harm, such as retreating as far as he could or disabling his adversary without killing him. That is still a duty. If a man attacks us wrongfully, if he is seeking then and there to make an attack upon us in such a way as to jeopardise life, and we can turn aside that attack without destroying his life, it is our duty to do it. It is our duty, in the first place, to get out of the way of the attack, and that is a duty springing from our own self-interest, because if a man can avoid a deadly result with due regard to his own safety, is it not better for him to do it than to rush rashly into a conflict where he may lose his life? He is doing it in the interest of his own life. And, then, aside from that, in the interest of the life
117 of the party who attacks him, he is required to do it. Then under this proposition, to give the defendant the benefit of it, he must have been doing what he had a right to do at the time, and while so situated he must have been attacked by Phill Duncan, the deceased, in such a way as to indicate from the nature of that attack, and the way he was executing it, a purpose upon the part of Duncan then and there by that conduct to take his life, or to inflict upon him some great violence; and he must have been so situated, so surrounded by danger, that he could not get out of the way of it, or he could not turn it aside by an act of less violence than what he did do. He must have exercised reasonable means, in other words, to avoid the dreadful necessity of taking human life, because the law says that he could kill provided he use all the means in his power otherwise to save his own life.

That is the proposition of real danger. It is a proposition which embraces a state of case where the danger is then and there hanging over him; not, as I have already told you, danger that may have existed at some remote period before that time, or a period at the time described by some of the witnesses before that time; not danger, either, that might come sometime in the future, but danger that was then and there so immediate, so impending over him, and about to fall upon him, and that he could not get away from it. Under this proposition he could slay, but that state of case must exist under the law of self-defense. It does not mean that we can kill from this wild sense of justice which pervades the minds of some men that they have the right to slay whenever they conceive a purpose of that kind would be right from their standpoint. That is not the law of self-defense. The law of self-defense is like all other principles of law. It is definite. It is certain. The law, in order to prevent the wrongful destruction of human life,
118 defines the right of the citizen when it says to him, under certain circumstances, you may slay your fellow-man.

THE DOCTRINE OF APPARENT DANGER.

There is another proposition of this law of self-defense which embraces a state of case that is called "apparent danger" to life. Now we must note with care what that is, because sometimes we make great mistakes when we do not understand this proposition. Jurymen naturally inquire in their own minds, I believe, when it is asserted that upon a state of apparent danger a human life may be destroyed, or danger to life or of great violence to the person, what is meant by that? Does it mean that if a man thinks there is danger to his life he can slay, and be excused in doing it? Not at all. That would be a most uncertain rule—a rule most destructive of the rights of the citizens—of each and every peaceable citizen. There would be virtually no protection under the law if that was the rule, because you never could find a man who had slain his fellow-man, when he was confronted by a jury of his countrymen, who would not be able to say that he thought there was danger to his life, and he therefore slew in consequence of that thought. And there would be no way of measuring, there would be no way of weighing, the correctness of that position or the correctness of the assertion, because when you depend upon the declarations of men *in extremis*, almost, or when they are pressed by a condition, we must, in order to corroborate them—in order to see that they are truthful—have some living, vital facts—tangible, real facts—that we can lay hold of outside of such declara-
119 tion, in order that we may correctly see shadowed forth the mental condition of the party at the time, and we are not allowed to trust to words alone as evidence of a mental condition. We must take the acts as transpiring at the time of the occurrence, when they were not prepared for the trial, but when they occurred in the natural course of the killing, or of the transaction which resulted in death. We must take them to enable us to correctly characterise that killing, and we are not to depend alone upon the say so of the man who may have executed that deadly purpose when he is called upon a long time afterwards to declare what his purpose was and why he did it. We are to see whether

that statement is correct or not; whether it is corroborated by the facts and circumstances. That is why we take it. If it is not, we do not take it. If the facts and circumstances, in other words, contradict it, we need not take it. I will now read to you this proposition of apparent danger. It says:

"When from the nature of the attack there is reasonable ground to believe that there is a design to destroy life, or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended."

"When from the nature of the attack"—that means that at the time of the killing, in this case, Phil Duncan, the deceased, was doing something which from the way he was doing it indicated that it was a deadly attack upon the life of the defendant, or an attack of a character that might produce upon the defendant great violence, great personal violence—and, of course, he was in the right, as in the other case; that is to say, he was in the lawful pursuit of his business, doing what he had a right to do, and there was reasonable ground from that attack, and from
120 the surrounding circumstances, to believe that there was a design upon the part of Phil Duncan to destroy his life, or commit any felony upon his person—that is, a great injury upon his person—"the killing the assailant will be excusable homicide, although it should turn out afterwards that no felony was intended." That means that the party was doing something which is overt in its nature—that is, outward—that we can see, or that witnesses might see—something which from the way it is being done or sought to be done would indicate to the mind of a reasonable persons that it was a deadly act. It might not have been that, it may have been deceptive in its character, but it must have been an act which indicated from its nature that it was of that kind. There is an illustration given to this rule by the judge who declared that as the law, and it has never been shaken—that is, successfully. It has been attacked by many men, and sometimes by courts who had little knowledge of what the law upon those propositions was. I say this because the courts of the country who are devoted to the enforcement of the law of the land have adhered with all tenacity to this rule as it is declared here. Now, it does not mean that a man has a bare conception in his mind that there is danger to his life, or that there is to be great violence inflicted upon his person, and he acts upon that. The test is whether or not, situated as he was, he had such ground as would, from the acts of the party killed, from the acts of Phil Duncan in this case, satisfy a reasonable man that it was the purpose of Duncan then and there, that he was then and there apparently engaged in executing a design or a purpose to destroy his life. There must be that state of case. As to whether he did that or not, from the facts and circumstances in the case you are to ascer-
121 tain; you are the final arbiters, the final judges, and you are finally to say whether that was the condition or not. Now, a man can not avail himself of this law of apparent danger because he might have had a bare fear of that. There must be something else in existence, as I have told you already, something that would satisfy a reasonable man of it, and the law is express upon that proposition. It tells us when we may rely upon this law of apparent danger; it tells us what a state of bare fear is, and it tells us that we can not act upon that condition.

Listen to the law:

"It is not enough that the party believed himself in danger, unless the facts and circumstances are such that the jury can see that he had reasonable ground for his belief."

That is the doctrine in short form.

Again, reading from the case of John Evans v. The State, where the court said:

"To shoot down another on sight, and who at the time was making no hostile demonstration dangerous to life and limb, and especially if not prepared and armed so to do, is in law murder. It is murder because the law tolerates no justification and accepts no excuse for the destruction of human life on the plea of self-defense except that the death of the adversary was necessary, or apparently so, to save his own life, or his person from great bodily injury; and there shall be imminent danger of such design being accomplished. The danger to life or of great personal injury must be imminent, present at the time of the killing, really or apparently, and so urgent that there is no reasonable mode of escape except to take life. When we use the term "apparent"—"apparent danger"—
122 we mean such overt, actual demonstration by conduct or acts of a design to take life, or to do some great personal injury as would make the killing apparently necessary to self-preservation."

Then he gives an illustration:

"As if A, who had threatened the life of B, presented at him a gun in shooting posture, and within range; B might well anticipate the fire, and if he should kill A he would be justified, although it turned out afterwards that the gun was not loaded and it was only intended to frighten him. Here was an act done which was apparently dangerous to life, in execution of a threat. This serves to illustrate what is meant by apparent danger."

There was an overt act done, an act that could be proven, and an act that would ordinarily satisfy a reasonable man that it was the purpose of the party who was the author of that act to do an act of deadly violence. But if, in the language of this jurist, as I have already read it to you, he was not doing an act of that kind, if he was not prepared to do it, if he was not armed to do it, if he was not doing any overt act with a weapon apparently of a deadly nature, there would be no foundation for the doctrine of apparent danger in a case of that kind. The party would be acting simply upon a state of bare fear and that does not give him the right to slay, the law says. He can not act upon that and then invoke the law of self-defense for his protection.

I have now given you, gentlemen, both propositions of the law of self-defense. I have told you what was meant by the doctrine of bare fear.

PREVIOUS THREATS OF DECEASED.

Something was said in the testimony, something was offered here in evidence, in reference to previous threats made by the deceased
123 against the defendant. In the first place, the first duty of a jury upon that question is to find out whether those threats were made, and you are to find it out in a reasonable way; you are to apply the reasonable rules that you apply in all of your investigations in these cases. You are to

take into consideration the case with which it may be stated that previous threats had been made, when the author of them can not confront that accusation, can not be brought into a court for the purpose of denying that accusation, because he is in his grave. The first thing, then, I say, is for you to apply these reasonable rules that you are to apply to the evidence in the case to see if it is true, and to ascertain if the threats were actually made, and if they were meaning. There is a difference between a statement made by a man in a drunken condition—it may be mere idle bravado, as the law says mere idle gasconade, which amounts to nothing. You are to see whether these declarations were meaning or not, whether they were made. If you find that they were made you have no right to say that the defendant could kill because threats were made. That would be a proposition which would destroy all the protecting power of the law. As an illustration, suppose A wanted B killed, and he would go and tell C that B had made violent threats against him. C would take his gun and hunt up B and kill him. It would turn out afterwards that B had never made any threats, had no enmity against C, and that C had been used as an instrument to execute a murderous design entertained by A. You see, these illustrations bring out the reason of the law, and not only the reason but they exhibit fully its justice, almost its sublime justice, in many cases where you consider that the whole framework of it is put together for the purpose of sheltering and protecting that precious thing called innocent human life. Therefore, a
124 threat which has been made does not give a man the right to slay. He can not kill because of that. If he does, if threats are made against a party, and they are communicated to him, and he broods over them, and forms a design to kill because of these threats, and does kill because of them, that is evidence of malice aforethought, because it would show premeditation; it would show that the design to kill was thought of beforehand, was contemplated beforehand. Now, there is an office filled by threats in a case. They are used as what the law calls illustrative evidence. They are not permitted to stand alone as a justifying fact in the case, but they may be taken into account provided the proof shows that at the time of the killing, in this case, of Phil Duncan by the defendant, that Duncan was doing something which indicated a purpose to execute a deadly threat. If that was the case, and the threat had been communicated to the defendant, or the defendant heard it, then he could take into consideration the threat in conjunction with the act; but if it was not known to him, and had not been communicated to him, you could only consider it when there was a question in your minds as to how the killing occurred, when there was a serious question in your minds about it. If the evidence of the eyewitnesses, or of the dying declarations of the deceased, or his declarations made in such a shape as to be what is called res gestæ—things standing around the killing, so near to it that they stand around it—if these show what happened at the time of the killing so that there could not be in your minds any reasonable question as to the method of the killing, then the uncommunicated threats cut no figure at all in your minds, and they are not to be considered by you in the shape of justifying facts or excusing facts or mitigating facts—if they come to you under circumstances of that character.

Now, let us see what the law says upon that subject. And there
125 are many propositions of law upon this subject of threats. In Prichett v. The State, 22 Ala., 39, it was said:

"But, however bad or desperate that character may be, and however many threats such person may have made, he forfeits no right to his life until, by an actual attempt to execute his threats, or by some act or demonstration at the time of the killing, taken in connection with such character or threats, he induces a reasonable belief on the part of the slayer that it is necessary to deprive him of life, in order to save his own or to prevent some felony upon his person."

You see, now, what figure they cut. Again, in the case of Wiggins v. People, etc., in Utah, 93 U. S., 465, the authorities upon this subject were all collected in a dissenting opinion by a very eminent jurist who dissented from the opinion of the court, but what we shall read to you from is the authorities collected by him laying down this doctrine upon the subject of previous threats and the office they fill in the trial of a case; and also upon this subject of bare fear, or killing upon a state of bare fear, bearing upon the proposition of the law of apparent danger as I have given it to you, and I will read that to you first:

"Unless the party has reasonable ground of apprehension at the time, the justification will fail; it being settled law that a bare fear, unaccompanied by any overt act indicative of the supposed intention, will not warrant the party entertaining such fears in killing the other party by way of precaution if there be no actual danger at the time."

"Remarks already made are sufficient to show that a bare fear of danger to life, unaccompanied by any overt act or manifestation indicative of a felonious intent to that effect, will not justify the person
126 entertaining such fears in killing the supposed assailant. Such a defense is not made out unless all the conditions of the proposition before explained concur in the immediate circumstances which attend the act of homicide."

Again, speaking upon the subject of bare fear, he says it was held in the case of Newcomb v. State, 37 Miss., 400, "that the belief on the part of the accused that the deceased designed to kill him is no excuse for the homicidal act, unless the deceased at the time made some attempt to execute such a design and thereby induced the accused reasonably to believe that he intended to do so immediately."

Now, upon this question of the office filled by threats in the trial of a case, and how they are to be considered by the jury:

"Courts of justice everywhere agree that neither the bad character of the deceased nor any threats that he may have made forfeits his right to life until, by some actual attempt to execute his threats, or by some act or demonstration at the time of the killing, taken in connection with such character and threats, he induces a reasonable belief on the part of the slayer that it is necessary to deprive him of life in order to save his own or to prevent some felony upon his person."

"Jurists and text-writers appear to concur that antecedent threats alone, whether communicated or not, will not justify a subsequent deadly assault by the other party, unless the party who made the previous threats manifests at the time of the act a design to carry the threats into immediate effect."

That is just as plain as the a b c's in the spelling book; there can be no mistake about it. So that, unless there was a condition springing from the act, in this case, of Phil Duncan, the deceased, at the
127 time of the killing, showing from his conduct and actions, he being prepared so to do, a purpose upon his part to execute a deadly design against the defendant, or a design that might inflict great injury upon his person, unless by some act at that time he indicates a purpose of that kind, when that act is considered in conjunction with threats made by him the threats are not to be taken into account to excuse him of killing, to justify him in taking the life of the deceased.

That is the office that threats cut.

AS TO PREVIOUS ACTS OF VIOLENCE OF DECEASED.

It may be necessary to give you the law as to previous acts of violence of the deceased. I have already outlined the law in its general principles upon that subject, but there is a distinction to be made as to whether a previous act of violence, which might have been even deadly in its character, can be taken into account to mitigate a crime or to justify it. The law says that if there is cooling time—if a man executes, or is seeking to execute, and he has the means of doing it, an act of deadly violence upon another, and between that time and the time when he slays that other there is what is called cooling time, the act can not be taken into account to justify or mitigate the crime, because the law contemplates that his judgment has resumed its sway and that his mind is not then in an inflamed condition. The law is clear upon that proposition. Speaking upon this subject in the case of The State v. Hill (4 Dev. & Batt., 491) the supreme court of North Carolina said:

"The proper enquiry to have been submitted to the jury on this part of the case was whether a sufficient time had elapsed after the prisoner was stabbed and before he gave the mortal wound for passion to
128 subside and reason to reassume her dominion, for it is only during the temporary dethronement of reason by passion that this allowance is made for man's frailty. And in prosecuting this enquiry every part of the conduct of the prisoner, as well words as acts, tending to show deliberation and coolness on the one side, or continued anger and resentment on the other, was fit to be considered, in order to conduct the jury to a proper result."

That contemplates a state of case where a man had actually received great violence. In the case read from the man had been stabbed, and the case is as strong as it could be put where an act of violence that might have produced his death had been inflicted actually, and the question in that case, when they come to discuss the proposition as to whether that could be taken into account to mitigate the crime, was whether or not there was time for his mind to cool between the infliction of that act and the time he did the killing.

Again, upon that subject:

"If the jury should find that between the provocation given and the killing there was sufficient time for the voice of reason and humanity to have resumed her sway, whether in this case she had done so or not, the killing was murder, and not manslaughter."

It can not be taken into account to mitigate the crime, says the law, when there is what is called cooling time.

ADULTERY WITH WIFE AS A PROVOCATION.

We now come to another proposition to which allusion has been made in this case—the question as to whether or not adultery with the wife of a man gives that man the right to slay the one occupying that position. In the first place, when that is asserted, you are to take into consideration whether or not from the facts in the case there is anything of that
129 kind proven—whether or not there has been a state of case of that kind established. The general proposition of the law is (and I will read it to you presently) that adultery with the wife is no mitigation or justification unless the party kills while the deceased and defendant's wife were caught by him in the act of adultery. If a man kills another in the act of adultery with his wife—he kills him at that time—the law says that is manslaughter; it is even then only manslaughter. Now, let us see what the law says upon that subject. It is very explicit upon this proposition; so explicit that there can be no mistake about it:

"The rule applicable to killing upon provocation produced by such offenses is, that if a husband immediately slay one taken in the act of adultery with his wife, it is manslaughter only."

There are a great many authorities referred to sustaining that proposition:

"Thus, in a prosecution for murder, it was held that evidence that, the evening preceding the homicide, the deceased came to the prisoner's house, and had the prisoner's wife on the bed with her clothing up and attempted to ravish her, was properly rejected; because, if admitted, it could not have had the effect of mitigating the crime.

"Sir Michael Foster expresses the reason of this rule, as follows: 'For let it be observed that in all possible cases, deliberate homicide upon a principle of revenge is murder. No man, under the protection of the law, is to be the avenger of his own wrongs. If they are of such a nature for which the laws of society will give him an adequate remedy, thither he ought to resort. But, be they of what nature soever, he ought to bear his lot with patience, and remember that vengeance belongeth only to the Most High.'"

The doctrine upon this point is most clearly stated by the court
130 in the case of State v. Neville (6 Jones, Law, 433, 434) by the supreme court of North Carolina, and the court in that case at length gives the reason of the rule why it will not do to say that a man can kill another when it is reported to him that that other has committed adultery with his wife. It is pretty much upon the same principle that a man is not permitted to kill another when he hears that that other has threatened his life. It is so easy to fabricate stories of that kind, it is so easy to deceive a man into doing a bloody act which would be the regret of his life, because it might turn out afterwards that no state of adultery existed. But listen to what this court said upon this subject:

"With respect to the case of adultery," said Ruffin, J., in the case from North Carolina last quoted, "the law is found in the most ancient archives of the common law, and has been brought down to us in the

same plain and precise terms by the ablest judges and the most eminent writers on the criminal law, and a court at this day has no more authority to interpolate new qualifications or exceptions into it than power to make a statute. But the rule of the common law on this head stands not alone on its authority. It is commended as well by its wisdom. Homicide is extenuated to manslaughter, not by the fact that it was perpetrated in a fury of high passion, but by the fury's being excited by a present provocation, which the law deems sufficient for the time to deprive men in general of that power of reason and reflection which ought to lead them to appeal for redress to the law, and instead thereof prompts them to take the law into their own hands. The wrong is thus infallibly known, and the wrongdoer is then made instantly to expiate it with his blood. But when a husband only hears of the adultery of his wife, no matter how well authenticated the information may
131 be or how much credence he may give the informer, and kills either the wife or her paramour, he does it not upon present provocation, but for a past wrong—a grevious one indeed, but it is evidence he kills for revenge. Let it be considered how it would be if the law were otherwise."

Now, here is the wisdom of it;

"How remote or recent must the offence be? How long or how far may the husband pursue the offender? If it happen that he be the deluded victim of an Iago, and, after all, that he has a chaste wife, how is it to be then? These enquiries suggest the impossibility of acting on any rule but that of the common law, without danger of imbruing men's hands in innocent blood, and certainly of encouraging proud, heady men to slay others for vengeance, instead of bringing them to trial and punishment by law. It is obvious that these observations apply with equal force to an alleged rape, or an attempt to commit a rape on a wife at a past time; and this case furnishes a forcible illustration of the extreme hazard of extenuating the offence of taking the life of a fellow-man upon information."

Upon information that a thing of that kind has been committed.

Now, that is the law, gentlemen, and whatever wild notions men may have in this age and day of the administration of the law about these things, we are to pin our faith to the law, and we are to execute it as it is. We are not responsible for the consequences. In this case, if a report was brought to this defendant that the deceased had committed adultry with his wife, and was on intimate terms with her, and if the defendant killed the deceased for that reason, when the deceased had been on intimate terms with the defendant's wife prior to that time, that
132 is evidence of a killing for vengeance; that is evidence of a killing in violation of the law, and, according to the law I have read to you, that fact can not be taken into consideration as an extenuating fact, or even as a fact to reduce the grade of the crime. It is murder when a man kills for vengeance, whether it be because somebody may have informed him of a relation of that kind or not.

Now, that is sufficient upon that point.

AS TO THE EVIDENCE.

These are the propositions of the law which, as I think, are necessary to be given in the case. We come now to this other part of the case to which, of course, you must pay especial attention, because you are to solve the problem by the law and the evidence. We come now to the evidence in the case. You are to pass upon its weigh'. You are to determine what it is. You are to determine what it proves, what it establishes in the case.

RES GESTÆ STATEMENTS OF DECEASED.

You have evidence of different kinds here. You have the statements, as I have already intimated to you, of the deceased, admitted by the court before the proof showed the dying declarations made by him, upon the ground that they were so near to the act as done by the defendant as to be what the law terms the res gestæ—surrounding the fact, or a fact so near to the killing as to be considered as a cotemporaneous fact with it, to be taken into consideration as illustrative of the killing, as illustrative of the manner of the killing, as illustrative of the proposition as to whether the defendant was there for an illegal purpose or not. That fact was admitted as a competent fact in the case. Evidence of that
133 kind is admitted when coming from a party under such circumstances upon the theory that there has not been time, under the circumstances, for him to fabricate the story, and you are to take it just as you are to take other items of evidence and weigh it according to its own inherent strength, according to its own inherent proving power, and then you are to take it in the light of the other evidence to see whether it is in harmony with the testimony of this lady who first testified on the stand, and who told you what she saw in the case as occurring at the time of the killing; whether these res gestæ statements made by the deceased are corroborated by what she tells you by her evidence.

DYING DECLARATIONS OF DECEASED.

Then you have evidence coming, as was remarked by the district attorney very forcibly—and it is a forcible expression—from the grave. That is figurative, of course; it means statements coming to you in the shape of the dying declarations of the deceased. This kind of evidence is admitted from necessity, and it is admitted because the law deems it, when given under circumstances of impending dissolution, that the party who gives it has the conception that he is about to die and will be called upon to render an account for what he may have said and done here, and that the statements so made are as binding upon his conscience as though he were called and an oath administered in open court in the presence of a court and jury. Now, for that reason these dying declarations are admissible. Of course, they do not come to you with any cross-examination by the other side against them, but you are to look at them, to look at their reasonableness, and you are to see what the circumstances of this killing were in the light of these declarations when considered alone or when considered in conjunction with the positive evidence of the eye-
134 witnesses in the case, or whether they are in harmony with the declarations made by him as part of the res gestæ as surround-

ing the killing, as being so near to the time of the killing as to be part of it. That evidence comes before us. That is positive evidence. That is evidence of an eyewitness. That is evidence of a witness who saw the killing, and it may be regarded as that sort of evidence in conjunction with the testimony of this lady who testified before you. You are to see the nature of that evidence. You are to see whether it corroborates her statements, or rather whether the statements made by her corroborate the statements of the deceased made in extremis, and made as res gestæ of the occurrence, or whether they corroborate what the defendant says about it; whether his story as to how this occurred is sustained by her evidence or sustained by the evidence of the deceased, or whether the evidence of the deceased and the evidence of the lady who testified contradict what he says. These are all facts in this case, and facts that you are to take into consideration to enable you to get at the truth of this case. You have a right to take into consideration, I say, all these facts and circumstances at the time of the killing. You have a right to take into consideration what was said by the deceased to Mr. Lipe before he was shot, when the defendant made certain declarations; what was said by the deceased in contradiction of these declarations of his purpose. All these matters have gone before you as competent facts.

FLIGHT OF THE DEFENDANT.

You take into consideration, in other words, the facts and circumstances which led up to the killing, the facts and circumstances which transpired at the time of the killing, and you do not stop there, but you take into consideration the facts and circumstances as affecting the defendant subsequent to the killing. For instance, you take into
135 consideration the defendant's flight from the country, his going into another part of the country, as evidence. And you are to pass upon the question as to whether or not he has sufficiently explained away the presumption which the law says arises from flight when a man has taken human life. It is a principle of human nature, and every man is conscious of it, I apprehend, that if he does an act of which he is conscious is wrong, his conduct will be along a certain line; he will pursue a certain course not in harmony with the conduct of a man who is conscious that he has done an act which is innocent, right, and proper. The truth is, and it is an old scriptural adage, "That the wicked flee when no man pursueth, but the righteous are as bold as a lion." Men who are conscious of right have nothing to fear. They do not hesitate to confront a jury of their country, because that jury will protect them, it will shield them, and the more light there is let in upon their case the better it is for them. We are all conscious of that condition, and it is therefore a proposition of the law that when a man flees the fact that he does so may be taken against him, provided he does not explain it away upon some other theory than that of his flight because of his guilt.

"A man accused of crime hides himself, and then absconds. From this fact of absconding we may infer the fact of guilt. This is a presumption of fact, or an argument of a fact from a fact."

Again, upon that subject:

"* * * flight by a defendant is always relevant evidence when offered by the prosecution, and that it is a silent admission by the

defendant that he is unwilling or unable to face the case against him. It is in some sense, feeble or strong, as the case may be, a confession; and it comes in with the other incidents, the corpus delicti being
136 proved, from which guilt may be cumulatively inferred."

Now, that is the figure that flight cuts in a case. It is a question in this case whether this defendant has sufficiently explained it here to take away the effect of the presumption arising from flight.

AS TO THE EVIDENCE IN GENERAL.

Now, gentlemen, I ask you to take into consideration all of this testimony you may find to be true. That is the first duty of the jury, to go over the evidence and find out what is true and what is not true, and in doing so you apply these rules which declare to us what are the attributes of truth in order to find what is true. For instance, the truth has attached to it a consistency; it is consistent with all other truths which are relevant to a given proposition. It is harmonious with all other truths. It is reasonable. It strikes the mind of a just and reasonable man as being reasonable in its nature. Then its harmony, its consistency, its reasonableness are its attributes to recommend it to us and to enable us to see when it is the truth. If it is inharmonious with other truths, that is an evidence that it is not true. If it is not reasonable as given, and as portraying a condition which seems to be unreasonable, then it lacks another attribute. If it is not consistent in itself, or with other testimony which we find to be true, then we find it still lacks another attribute. Again, if it is not in our judgment as reasonable men probable and natural, it lacks still another attribute. You are to find out, first, what the truth is, as best you may, and then you are to apply the principle of the law which is applicable to that truth, whatever it may be, and in that way you solve the problem. In a case like this you take into consideration the positive evidence. The evidence of Mrs.
137 Hensley is positive evidence, and the evidence of Mrs. Lipe, as far as her observation went, is positive in its character. The res gestae declarations of the deceased is positive evidence. The dying declarations of the deceased is positive evidence. All this evidence is positive evidence because all of these declarations come from persons who assert that they saw that which they tell you they saw, and that is proof by evidence which is positive, that is a positive fact. You gather up all of these positive facts, see whether they are accusatory, whether they show guilt under this law I have given you. And then in order to attest these positive facts, see whether they are in harmony with the facts that come to you as circumstances, because these facts can be used not only as proving facts in the case, but they can be further used as facts to test the truth of the positive evidence, for the reason that they never forget, they have no short memories, they have no motives to operate upon them to influence them to one side or the other. If they come before you as consistent, harmonious, probable, and natural facts, they are powerful as proving facts in the case, and, in the language of the great poet, they speak with windrous tongue of a transaction. They go to corroborate the positive statements of eyewitnesses, if they are in harmony with such statements, and they of themselves may show a state of case upon which we

may rely with entire confidence, leading us to believe in the truth of it one way or another. Then after you have gathered up all of these facts, positive and circumstantial, which are accusatory, or which tend to show guilt, look to the other evidence you may find to be true in the case to see whether it has explained away these accusatory facts, whether it weakens or detroys them so as to leave the case in a condition where it is not established beyond a reasonable doubt. If these facts offered upon
138 that side for that purpose do not have that effect, and the other facts, positive and circumstantial, the other accusatory facts, are sufficient in proving power to bring your minds to a condition when considered in the light of all the evidence which if true, where you are able to say that the case in your judgment is established beyond a reasonable doubt, your duty is to follow that conclusion in the performance of the legitimate duty which has been imposed upon you, by finding a verdict for whatever may be established to that extent.

The law says that in passing upon the credibility of witnesses you consider their interest in the case, and the way they may be affected by the result of it. That more especially in a case of this kind is a rule applicable to the defendant. He is the party who stands before you charged with the crime of murder, accused of having taken the life of a fellowman in such a way as that under the law it is murder. That is the accusation upon the part of the Government alleged against him. Therefore he is to be affected most seriously, and in a powerful way, by the result of your finding, by the result of your verdict, and presumably he is conscious of that fact. He has the same human nature which you and I have, which may, to a greater or less degree, lead him to the side of falsehood or truth, as the case may be; but that he has human nature is a fact of which you can take notice, and it is a further fact of which you can take notice that when that human nature is confronted largely by self-interest it is probable, natural, and reasonable that it may to some extent be governed by that self-interest; and if we would do justice in a case, if we would administer the law and apply it to a state of truth which we are to find in a case, we are to apply it in the light of these self-evident principles of nature which we know to have an existence, and
139 which we know to have such an existence, as that ever' man's mind is so organized and constituted that it is more or less susceptible to influences of that character. Then consider that evidence coming from him in the light of his relation to this case. You do not necessarily disbelieve it because of that relation, but you proceed further in your investigations as to its truthfulness to see whether it is corroborated or contradicted by other evidence. If it is contradicted by other evidence which is reliable, then it is weakened just as you attach credit to the contradicting facts. If it is sustained by other testimony which is reliable, then it is corroborated just as you attach credit to the corroborating facts.

PROOF BEYOND REASONABLE DOUBT.

The law says if you are satisfied beyond a reasonable doubt of the truth of this charge, your duty is to convict. The meaning of this expression has been fully explained by the Supreme Court of the United States, and

it is better to adopt the language of that court, and I will therefore read it briefly to you as to what is meant by this doctrine of reasonable doubt.

"The court charges you that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt. That if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find him not guilty. You are further instructed that you can not find the defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt.

"The court further charges you that a reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the
140 evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating," as this court says, "to your own affairs, you would have no reasonable doubt."

Speaking on that proposition of the law the Supreme Court said:

"The instruction is not materially different from that given by Lord Tenterden, as repeated and adopted by Chief Baron Pollock, in Rex v. Muller. 'I have heard,' said the Chief Baron, addressing the jury, 'the late Lord Tenterden frequently lay down a rule which I will pronounce to you in his own language: "It is not necessary that you should have a certainty, which does not belong to any human transaction whatever. It is only necessary that you should have that certainty with which you should transact your own most important concerns in life." No doubt the question before you to-day—involving as it does the life of the prisoner at the bar—must be deemed to be of the highest importance; but you are only required to have that degree of certainty with which you decide upon and conclude your own most important transactions in life. To require more would be really to prevent the repression of crime, which it is the object of criminal courts to effect.

Again, in speaking of this rule I have read to you, the Supreme Court remarked:

"It is simple, and as a rule to guide the jury is as intelligible to them generally as any which could be stated, with respect to the conviction they should have of the defendant's guilt to justify a verdict
141 against him. But in many cases, especially where the case is at all complicated, some explanation or illustration of the rule may aid in its full and just comprehension. As a matter of fact, it has been the general practice in this country of courts holding criminal trials to give such explanation or illustration. The rule may be, and often is, rendered obscure by attempts at definition, which serve to create doubts instead of removing them, but an illustration like the one given in this case, by reference to the conviction upon which the jurors would act in the weighty and important concerns of life, would be likely to aid them to a right conclusion, when an attempt at definition might fail. If the evidence produced be of such a convincing character that they would unhesitatingly be governed by it in such weighty and important matters,

they may be said to have no reasonable doubt respecting the guilt or innocence of the accused, notwithstanding the uncertainty that attends all human evidence. The instruction in the case before us is as just a guide to practical men as can well be given; and if it were open to criticism it could not have misled the jury, when considered in connection with the further charge, that if they could reconcile the evidence with any reasonable hypothesis consistent with the defendant's innocence they should do so, and in that case find him not guilty."

Gentlemen, that is a definition of proof of a proposition beyond a reasonable doubt. If it is proven in this case to that extent, your duty is to convict.

CONCLUSION.

Then I ask you to take the evidence, find what the truth is, find what principle of the law is applicable to that truth, and make the
142 proper application, and pronounce that application in your verdict. Of course you are aware that you have sworn to try this case according to the law and the evidence. You are not to be swerved to the right or to the left by any other consideration than that high sense of duty which prompts you to look at the evidence faithfully, impartially, and thoroughly, find what it is—find what the truth is—and then make the application of the law to that truth, and in this way uphold the dignity and power and supremacy of the law of the United States. If it has been violated, vindicate it by pronouncing the verdict which would vindicate the violated law; if it has not been violated, pronounce a verdict in accordance with that state of case.

You will find blank forms of verdicts upon the back of the indictment.

The case is submitted to you with the confident belief, under all circumstances and at all hazards and from every standpoint in the case, that when you have found the truth you will be governed by that truth and the law applicable to it.

Mr. WILLIAM M. MELLETTE (of counsel for defendant). I have some exceptions to file.

The COURT. Yes.

5:30 o'clock p. m.

143 *Exceptions taken by defendant to charge of court.*

In the circuit court of the United States, western district of Arkansas.

UNITED STATES *vs.* ED ALBERTY, ALIAS CHAS. BURNS.	Indictment for murder. No. 152.

Defendant files the following exceptions to the charge of the court delivered herein.

I.

Defendant excepts to language of the court in saying that the deceased would follow the status of his slave mother, and because he was a natural child.

II.

In saying that Phil Duncan was a jurisdictional citizen of the United States.

III.

To the language of the court as to the meaning of the term "willfully" as used in the indictment.

IV.

To the language of the court as to the law of "malice aforethought."

V.

In saying that in handling weapons a man must exercise the highest possible care.

144

VI.

To the reading of the extract from the case of State v. York as to meaning of term "willfully."

VII.

In saying if a killing is done willfully, and in the absence of anything which shows that it was done in self-defense, or anything to mitigate, it must be found to have been done with malice aforethought, which might be called the doctrine of elimination.

VIII.

In reading from Lander v. State, in Horrigan & Thompson's Self Defense.

IX.

When weapons indicating design are used it is not necessary to show that the design existed for any length of time.

X.

To the law of manslaughter as given by the court.

XI.

In saying that manslaughter usually arises where two men have a fist and skull fight, etc., and in not giving fully the several conditions which would be manslaughter.

XII.

In saying that if a man see a man in the act of committing adultery and kills, he is guilty of manslaughter. The language of the court is too restrictive.

145 XIII.

To the law of self-defense as given by the court.

XIV.

To the law of real danger, as given by the court, in connection with the law of self-defense.

XV.

In saying that it is evidence of malice aforethought if it is shown that defendant brooded over wrongs of his wife and the deceased in being too intimate with one another.

XVI.

In saying inferentially that it was defendant's duty to retreat as far as he could.

XVII.

To the failure of the court to charge the jury that if defendant found deceased attempting to get into the window where his wife was, and killed him in the heat of passion because of that act, and before cooling time had elapsed, defendant would only be guilty of manslaughter.

XVIII.

As to the law of apparent danger as given by the court in connection with the law of self-defense.

XIX.

If deceased was not doing any act with a weapon with which life could be taken or not, there is no case of apparent danger to be considered.

XX.

As to the law of previous threats on part of deceased as given
146 by the court, and in stating that they may become evidence of malice aforethought.

XXI.

In giving the law as to previous acts of violence, and in failing to charge that previous attempts on part of deceased to take life of defendant might be considered by the jury as showing that defendant had reasonable apprehension of danger from deceased.

XXII.

In giving the law as to effect of adultery between deceased and defendant's wife.

XXIII.

As to the law of dying declarations.

XXIV.

Upon the subject of the flight of defendant as evidence in the case against him.

XXV.

The failure of the court to charge the jury that the presumption of innocence is evidence for defendant.

XXVI.

As to the manner of summing up the evidence—taking the positive evidence, etc.

XXVII.

As to reasonable doubt, and the law on that subject.

147 XXVIII.

As to the weight to be given to defendant's testimony.

(Signed) BARNES & MELLETTE and
J. C. BYRES,
Attorneys for Defendant.

(Endorsed on the back thereof:) United States v. Ed Alberty. Exceptions to charge. Filed 11/14/'95, in presence of jury. S. Wheeler, clerk. By I. M. Dodge, D. C.

148 The jury then retired to consider their verdict and in due time returned into court the following verdict:

"We, the jury, find the defendant, Ed Alberty, alias Charles Burns, guilty of murder as charged in the within indictment."

(Signed) J. N. JONES, *Foreman.*

Whereupon the defendant filed his motion for a new trial, which was on the day of by the court overruled, and on said day last above mentioned the defendant was sentenced to be hanged.

And defendant now presents this his bill of exceptions, which he prays may be approved, and signed and made a part of the record, which is accordingly done.

I. C. PARKER,
District Judge, Holding Circuit Court.

(Endorsed on back:) Filed Dec. 9, 1895. S. Wheeler, clerk. By I. M. Dodge, D. C.

149 *Assignment of errors.*

In the circuit court of the United States, western district of Arkansas.

UNITED STATES
vs. } Murder.
ED ALBERTY ALIAS CHARLES BURNS.

Comes the defendant in the above-entitled cause and files this his assignment of errors committed on the trial thereof:

1st. It was error in the court to instruct the jury as follows:

"You have heard the evidence which has been offered before you for the purpose of showing that Duncan, the deceased, was born of a slave mother in the Choctaw Nation; that he was born there while slavery existed under the Government of the United States. That of itself would cause Duncan to partake, if he was alive, and did when he was alive, of the status of his mother. That is to say, if she was a colored person, and she had lived to obtain her freedom, she would be a citizen of the United States. She was a jurisdictional citizen even in slavery, entitled to the protection of the laws of the United States, and so was her offspring. That is one reason why the deceased would partake of the status of the mother, because the principle of the law is that persons born in a state of servitude follow the condition of the mother, and not the condition of the father."

2nd. The court erred in instructing the jury as follows:

"Ther' is an additional reason. The proof shows that he was a natural child, or, as we commonly call such persons, a bastard child. He was begotten out of wedlock. The rule of the law is that a child begotten in that way follows not the status of the father, but the status of the mother."

150 3rd. It was error in the court to instruct the jury as follows:

"Upon that state of facts, gentlemen, you would be authorized to find that because Phil Duncan, the deceased, was a jurisdictional citizen of the United States that this court has jurisdiction to try this defendant upon this charge."

4th. It was error in the court to instruct the jury as follows:

"For example, if a man is handling a dangerous agency, an agency that probably or naturally might produce death if wrongfully or carelessly handled, he is required to exercise the highest possible care under the circumstances, known as reasonable care, because reasonable men, in legal contemplation, do that very thing."

5th. It was error in the court to instruct the jury as follows:

"Now, it is a principle of the law that if a killing is wilfully done, and there is nothing in it to bring it under the law of self-defense, nor is there anything in it to mitigate the crime—that is, to reduce the grade of it from murder to manslaughter wherever the proof shows it was done wilfully and done in the absence of either one of these conditions I have named—the same evidence would show that it was done with malice aforethought."

6th. It was error in the court to instruct the jury as follows:

"Manslaughter usually arises out of a case where two men are engaged in an affray, in an ordinary fist and skull fight, to use that expression,

and in the heat of that fight one of them draws a weapon and takes the life of another without having previously prepared himself to wrongfully, illegally, and unjustifiably use that weapon if opportunity offers. If a man enters into an affray with his hands and fists, and he has prepared himself with a deadly weapon with a determination to use it wrongfully and improperly in that affray, that shows deliberation, shows premeditation, shows that he has selected a weapon to use wrongfully. He may select a weapon and he may wear it according to the great idea prevailing in this country that we can bear arms as citizens under certain circumstances, but, as I have told you, if he prepares himself for
151 the purpose of killing, wrongfully or improperly, in a way not justified by law, and while so prepared with such weapon he seeks an occasion in an affray to kill, and does kill, that would not be manslaughter, although it was killing in an affray. But if he does it without that preparation, suddenly, without having considered the deadly purpose beforehand to be wrongfully executed by him, and in the heat of passion draws a weapon and slays his adversary, that is manslaughter. There is another provocation which, as I will tell you after awhile, reduces the grade of the crime to manslaughter. I will say in this connection at this time that if a man kills another in the act of adultery with his wife, while committing that act he slays him, slays him while in the heat of mind engendered by an observation of that character, that is manslaughter. I will give you the law fully presently upon the proposition as to when a man may kill and ask to have his crime reduced to manslaughter in a case of adultery. I will simply read to you the law upon that subject."

7th. It was error in the court to instruct the jury as follows:

"Whenever there is cooling time, as the law says, time according to the ordinary operation of the mind of a man for it to settle down and to subside from a state of passion, which may be engendered by the difficulty that he was in with the party slain at some previous time, that difficulty can not be used to excuse or justify, under the law of self-defense, or to reduce the grade of the crime. If a man kills because of that condition, if that is the reason why he takes life, if he takes it because he may have brooded over the condition that existed as affecting him at the hands of the deceased, that is evidence of deliberation, that is evidence of premeditation, that is evidence that he thought of the killing beforehand, that he contemplated the deadly result. And, I say, that a difficulty of that kind does not excuse, nor does it mitigate, if it transpired at a period of time beforehand, such as is described by the witnesses in this case, if you find that there was a difficulty."

152 8th. It was error in the court to instruct the jury as follows:

"When he is in that condition, if he was in that condition in this case, and was then attacked by Duncan, the deceased, in such a way as to denote an intention upon the part of the deceased to take away his, the defendant's, life, or to do him some enormous bodily injury, he could kill Duncan—when?—provided he use all the means in his power otherwise to save his own life from the attack of Duncan, or preventing the intended harm, such as retreating as far as he could, or disabling his adversary without killing him. That is still a duty."

9th. It was error in the court to instruct the jury as follows:

"As if A, who had threatened the life of B, presented at him a gun, in shooting posture, and within range, B might well anticipate the fire, and if he should kill A he would be justified, although it turned out afterwards that the gun was not loaded, and it was only intended to frighten him. Here was an act done which was apparently dangerous to life, in execution of a threat. This serves to illustrate what is meant by apparent danger. There was an overt act done, an act that could be proven, and an act that would ordinarily satisfy a reasonable man that it was the purpose of the party who was the author of that act to do an act of deadly violence. But if, in the language of this jurist, as I have already read it to you, he was not doing an act of that kind, if he was not prepared to do it, if he was not armed to do it, if he was not doing any overt act with a weapon apparently of a deadly nature, there would be no foundation for the doctrine of apparent danger in a case of that kind. The party would be acting simply upon a state of bare fear, and that does not give him the right to slay, the law says. He can not act upon that and then invoke the law of self-defense for his own protection."

10th. It was error in the court to instruct the jury as follows:

"You are to take into consideration the ease with which it may be stated that previous threats had been made, when the author of them can not confront that accusation because he is in his grave."

153 11th. It was error in the court to instruct the jury as follows:

"Therefore, a threat that has been made does not give a man the right to slay. He can not kill because of that. If he does—if threats are made against a party, and they are communicated to him, and he broods over them and forms a design to kill because of these threats—that is evidence of malice aforethought, because it would show premeditation; it would show that the design to kill was thought of beforehand—was contemplated beforehand."

12th. It was error in the court to instruct the jury as follows:

"It may be necessary to give you the law as to previous acts of violence of the deceased. I have already outlined the law in its general principles on that subject, but there is a distinction to be made as to whether a previous act of violence, which might have been even deadly in its character, can be taken into account to mitigate a crime or to justify it. The law says that if there is cooling time—if a man executes or is seeking to execute, and he has the means of doing it, an act of deadly violence upon another, and between that time and the time when he slays that other there is what is called cooling time—the act can not be taken into account to justify or mitigate the crime, because the law contemplates that his judgment has resumed its sway, and that his mind is not then in an inflamed condition. The law is clear upon that proposition."

13th. It was error in the court to instruct the jury as follows:

"The general proposition of the law is that adultery with the wife is no mitigation or justification, unless the party kill while the deceased and defendant's wife were caught by him in the act of adultery. If a man kills another in the act of adultery with his wife—he kills him at that time—the law says that is manslaughter."

14th. It was error in the court to instruct the jury as follows:

"You take into consideration, in other words, the facts and circumstances which led up to the killing, the facts and circumstances
154 that transpired at the time of the killing, and you do not stop there, but you take into consideration the facts and circumstances as affecting the defendant subsequently to the killing. For instance, you take into consideration the defendant's flight from the country—his going into another part of the country—as evidence; and you are to pass upon the question as to whether or not he has sufficiently explained away the presumption which the law says arises from flight when a man has taken human life. It is a principle of human nature—and every man is conscious of it, I apprehend—that if he does an act *of* which he is conscious is wrong, his conduct will be along a certain line. He will pursue a certain course not in harmony with the conduct of a man who is conscious that he has done an act which is innocent, right, and proper. The truth is—and it is an old scriptural adage—'that the wicked flee when no man pursueth, but the righteous are as bold as a lion.' Men who are conscious of right have nothing to fear. They do not hesitate to confront a jury of their country, because that jury will protect them; it will shield them, and the more light there is let in upon their case the better it is for them. We are all conscious of that condition, and it is therefore a proposition of the law that, when a man flees, the fact that he does so may be taken against him, provided he does not explain it away upon some other theory than that of his flight because of his guilt.

"A man accused of crime hides himself, and then absconds. From this fact of absconding we may infer the fact of guilt. This is a presumption of fact, or an argument of a fact from a fact."

Again upon that subject:

* * * "flight by a defendant is always relevant evidence when offered by the prosecution; and that it is a silent admission by the defendant that he is unwilling or unable to face the case against him. It is in some sense, feeble or strong, as the case may be, a confession; and it comes in with the other incidents, the corpus delecti being proved from which guilt may be cumulatively inferred."

155 Now that is the figure that flight cuts in a case. It is a question in this case whether this defendant has sufficiently explained it here to take away the effect of the presumption arising from flight.

15th. It was error in the court to instruct the jury as follows: "The court charges you that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt. That if you can reconcile the evidence before you upon any reasonable hypothesis consistent with defendant's innocence, you should do so, and in that case find him not guilty. You are further instructed that you cannot find the defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt."

ED ALBERTY,
By BARNES & MELLETTE.

(Endorsed on back:) Filed Dec. 11, 1895. Stephen Wheeler, clerk By I. M. Dodge, D. C.

156 *Petition for writ of error.*

In the circuit court of the United States, western district of Arkansas.

UNITED STATES
vs. } Murder.
ED ALBERTY, ALIAS CHARLES BURNS.

To the clerk of the circuit court of the United States, western district of Arkansas:

Your petitioner, Ed Alberty, respectfully represents that at the November term, 1895, of this court he was convicted on Indictment No. , charging him with the crime of murder, and that the said court has pronounced judgment and sentence of death upon this petitioner, upon the verdict of the jury convicting him as aforesaid.

Your petitioner alleges that in the record and proceedings, in the trial of said cause in said court, there is great and manifest error to the prejudice and great damage of your petitioner. He therefore prays that a writ of error from the Supreme Court of the United States be issued by you, under the seal of the said circuit court in said cause, remanding the said cause and the record therein to the said Supreme Court, in order that the same may be there re-examined, and, if error be found, that the said judgment and sentence against him therein be reversed.

ED ALBERTY,
By BARNES & MELIZETTE,
His Attorneys.

(Endorsed on back:) Filed Dec. 11, 1895. S. Wheeler, clerk. By I. M. Dodge, D. C.

157 *Poverty affidavit.*

In the circuit court of the United States, western district of Arkansas.

UNITED STATES
vs. } Murder.
ED ALBERTY, ALIAS CHARLES BURNS.

I do solemnly swear that I am the identical Ed Alberty, alias Charles Burns, tried and convicted at the November term, 1895, of the United States court for the western district of Arkansas of the crime of murder; that I am now under sentence of death in said court.

That I am prosecuting a writ of error under sec. six, chapter one hundred and thirteen, of an act to abolish circuit court powers of certain district courts of the United States, and to provide for writs of error in capital cases, and for other purposes; that I am poor and utterly unable to pay the costs of prosecuting said writ of error, not being possessed of property of the value of twenty dollars, or of any value whatever. So help me God.

ED ALBERTY.

Subscribed and sworn to before me this December 9th, 1895.

STEPHEN WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

(Endorsed on back:) Filed Dec. 11, 1895. S. Wheeler, clerk. By I. M. Dodge, D. C.

158 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the U. S. for the western district of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit before you or some of you, between the United States, plaintiff, and Ed Alberty, alias Chas. Burns, dft., a manifest error hath happened to the great damage of the said Ed Alberty, alias Chas. Burns, as by his complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21 day of Dec., in the year of our Lord one thousand eight hundred and ninety-five.

STEPHEN WHEELER,
Clerk of the Circuit Court of the United States
for the Western Dist. of Ark.
By I. M. DODGE, *D. C.*

Allowed by:

Justice of the Supreme Court of the United States.

159 UNITED STATES OF AMERICA, *ss:*

To the United States, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the western dist. of Ark., wherein Ed Alberty, alias Chas. Burns, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgme't rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable I. C. Parker, U. S. dist. judge for the western dist. of Ark., holding circuit court, this 21st day of December, in the year of our Lord one thousand eight hundred and ninety-five.

I. C. PARKER,
U. S. Dist. Judge holding Circuit Court.

160 I hereby accept service of the within citation this 21st day of Dec., 1895.

JAS. F. READ, *U. S Atty.*

161 UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true and complete copy of the record & proceedings in the case of U. S. vs. Ed Alberty, alias Chas. Burns, the original of which remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 23 day of Dec., A. D. 1895.

[SEAL.]

S. WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

(Indorsement on cover:) Supreme Court U. S. Received Jan. 13, 1896. Clerk's office. Case No. 16143. Term No., 853. Ed Alberty, alias Charles Burns, plaintiff in error, vs. The United States. W. Arkansas, C. C. U. S. Filed January 13, 1896.

In the Supreme Court of the United States

OCTOBER TERM, 1895.

ED. ALBERTY, ALIAS CHARLES BURNS,
plaintiff in error,

v. No. 562.

THE UNITED STATES.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

ED ALBERTY, ALIAS CHARLES BURNS, plaintiff in error,
v.
THE UNITED STATES.

No. 853.

MOTION TO ADVANCE.

The plaintiff in error was indicted in the circuit court of the United States for the western district of Arkansas at the August term, 1895, for having murdered one Phil Duncan at the Cherokee Nation in the Indian country, on May 15, 1879. He was tried, found guilty, and on December 4, 1895, sentenced to be hanged.

The Solicitor-General respectfully moves the court to advance the case on the docket for hearing on such day as may be convenient to the court.

Notice of this motion has been served on the counsel for the defendant below, and proof of service filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

IN THE

SUPREME COURT OF THE UNITED STATES.

Case No. 853.

OCTOBER TERM, 1895.

ED ALBERTY,
alias
CHAS. BURNS. — Plaintiff in Error.

vs.

THE UNITED STATES.

In Error to the Circuit Court of the United States, Western District of Arkansas.

WILLIAM M. CRAVENS,

Attorney for Plaintiff in Error.

PRESS OF
RUGGEDGE-HIGGINS PUBLISHING COMPANY,
FORT SMITH, ARK.

.....IN THE.....

SUPREME COURT OF THE UNITED STATES,

Case No. 853.

OCTOBER TERM, 1895.

ED ALBERTY,
alias
CHAS. BURNS. } Plaintiff in Error.

vs.

THE UNITED STATES.

In Error to the Circuit Court of the United States, Western District of Arkansas.

Statement of Facts.

The defendant was convicted of the crime of murder, for the killing of Phil. Duncan in the Cherokee Nation, Indian Territory, in the year 1880. For some

time previous to the killing, Duncan had been paying such attentions to the defendant's wife, that it had caused she and defendant to separate.

The wife lived at Mr. Lipe's, where the killing occurred, and defendant made his home with some colored people by the name of Graves He, however, worked during the day, at the same place his wife did, and was frequently with her. After Duncan had become intimate with defendant's wife he conceived a great dislike to the defendant, and on three or four occasions attacked him with a knife and pistol, but defendant saved himself by getting out of the way. (See tistimony of Jim Smith, Abe Davis and Nora Sanders). Deceased also made violent threats against the life of defendant in addition to the attacks he made on him, and was trying to borrow a pistol to kill him just before he was killed. (See testimony of Thomas R. Graves and Rachael Graves). Early Sunday evening, before the killing occurred, he went to the house where defendant lived, and enquired particularly what bed defendant slept in and what time he came in at night. In reply to the question as to whether there would be any trouble, he said that they would see the next morning. This was two or three hours before he was killed. Sank Vann, a witness for defendant, testified that he saw the deceased at church, and after church was out, the latter told him he was going up to see "Mandy,"

meaning defendant's wife. That he told him that she was a man's wife, and he would get into trouble if he went up there.

The defendant and also his wife, were at church that night, and defendant accompanied his wife to Mr. Lipe's after church. She went in the house and defendant went back in the lot where the stock was, it being a part of his duty to look after the stock.

While he was in the lot he saw a window in the house raised, and he walked out into the yard and found the deceased at the window. He asked who was there. Deceased said, "God damn you, you will find out who it is." Defendant recognized his voice. Defendant ran backwards, telling deceased to stand off. Defendant called Mr. Lipe, who came down, and deceased said to defendant, "God damn you," and started at him as if to cut him, and defendant shot him, and he died next day.

Defendant left the country in a short time, and gave as a reason for it, that he had become convinced that his wife was untrue to him, and he wanted to get away from where she was. He went to his sister's in Kansas, and finally got work and married again, which caused him to give up the idea of coming back to the Nation. Defendant testified that he did not leave the country because he was guilty of a crime, but for the reasons above stated, and further that he had no means of properly defending himself should he be arrested

The proof showed that the deceased, Phil Duncan, was born of a slave mother, and a fullblood Choctaw Indian father, in the Choctaw Nation, Indian Territory; that when quite young he went to the Cheorkee Nation and married a colored woman, who was a citizen of the Cherokee Nation under the tready of 1866, and was so married at the time he was killed. The proof further showed that the defendant, Ed Alberty, was a citizen of the Cherokee Nation, having been the slave of a Cherokee Indian, and having been in the Cherokee Nation, as provided by the treaty of 1866, between the United States and the Cherokee Nation.

Brief and Argument.

The printed record has not been furnished us in this case; therefore in discussing the questions involved, it will be impossible to make the usual references to the pages thereof.

The first, second and third assignments of error, refer to that part of the charge of the court wherein the jury were told in substance that, Phil. Duncan, the man who was killed, was a jurisdictional citizen of the United States, it being conceded that Ed Alberty, defenant, is a *bona fide* citizen of the Cherokee Nation. If Phil. Duncan had Choctaw blood, he was a Choctaw Indian regardless of questions as to the status of his parents. And if he was such Indian, he had a right to live in the Chero-

kee Nation if he so desired. It is a well known fact that Indians, of the five civilized tribes, inter-mingle to a large extent, and that each tribe has jurisdiction of all those found within its borders.

The act 1890 relative to the United States Courts in the Indian Territory gives, or attempts to give those courts jurisdiction of certain crimes committed by the members of different tribes upon each other. But that act has reference only to crimes over which that court has jurisdiction. The crime of which defendant was convicted was, however, committed long before any court was established in the Indian country.

The Constitution of the Choctaw Nation makes no reference to the question as to who shall be citizens of said Nation.

All of the laws of the Nation recognize the right of every person to citizenship who can prove the Choctaw blood, irrespective of race, or previous condition. In a volume of laws republished in 1887, are to be found some rules governing the admission to citizenship. The following language is used:

"Such petition shall prove his or her blood, or other means by which they claim citizenship." Page 172.

The following is also a quotation from those laws. Page 173:

"The committee aforesaid to be appointed by the General Council, and to report to that body, by act or

resolution or otherwise, in reference to the petition, or petitions, of the person or persons, claiming to be citizens, or of Choctaw blood, or descent, and in the event of the adoption of such report of the committee, then such person or persons shall thereafter be deemed and considered to be *bone fide* citizens of the Choctaw Nation."

The date of the passage of these laws is not given, but it is a well known fact that it is only since the war, that any of the laws of that Nation have been preserved.

These extracts show that Choctaw blood gives citizenship. Of course if defendant was born and partly raised in the Choctaw Nation, it was not necessary for him to be declared a citizen if he had the blood.

The language of the court which is the fourth assignment, is in substance the same as was used in the case of Frank Carver vs. United States, which has just been reversed by this court. We have not seen the opinion in the Carver case, and as the question as to the degree of the case to be used by a person handling a dangerous agency was fully discussed by us in our brief in that case, we will not further present the question here.

The sixth assignment quotes the language of the court upon the subject of manslaughter. The law as given by the court upon this subject, was we think, misleading to the jury. The court says that manslaughter

usually arises when there is an affray—a fist and skull fight. The natural import of that language to the jury, was that unless there was a "fist and skull fight" there would most likely be no manslaughter. The court proceeds to give the law of manslaughter as it may grow out of a fist and skull fight, without explaining to the jury what other circumstances might be made the basis of that crime. As there was nothing like a fist and skull fight in this case, this part of the charge was wholly inapplicable and misleading.

The seventh assignment contains language of the court which is very objectionable. The court attempts to give the law applicable to a state of case where there has been previous difficulties between the parties. The proof in this case shows that the deceased had, just previous to the killng, made several unprovoked deadly assaults on the defendant. The court says if there had been "cooling time," that those assaults did not justify or mitigate, the crime, and proceeds to make an argument against defendant by saying in substance, that if defendant killed because he brooded over these previous difficulties, they became evidence of premeditation, and deliberation. This was a very unfair way of presenting the matter, as there was nothing in the testimony to show that he had brooded over the previous difficulties, and no claim of that kind was made by the district attorney. It seems more reasonable and just that the court should have told the jury that if the deceased had, pre-

vious to the killing, made deadly assaults on defendant, that the latter would not have to wait so long before acting in case of an overt demonstration upon the part of the deceased as he would if there had been no assaults of that kind. The court in this case has presented the question of previous assaults by deceased, so as to make them evidence against the accused as it has in this, and other cases which has been before this court, given the law as to previous threats upon the part of the deceased, so as to make them evidence against the defendant, which this court has said, is error.

In the eighth assignment the court gives the law as to defendant's duty to retreat, &c. The proof showed that he was on the premises where he worked and where his wife was at the time. It was not the defendant's duty to retreat. See Beard vs. United States, recently decided by this court.

The doctrine of apparent danger under the law of self defense is the subject of the ninth assignment. The illustration given by the court is misleading. It does not fit *every* case. The court says that if deceased was not armed with a weapon to do a deadly act upon defendant, that there could be no apparent danger. And further that deceased must have been doing some act with a weapon of a deadly character. Under the law as given by the trial court, a man might believe after careful consideration, and from the language and movements of the deceas-

ed, that he was about to draw a deadly weapon, but if he really did not have one and was merely "bluffing," the defendant must suffer. We do not understand that this is the true rule of apparent danger.

The language of the court as quoted in the tenth assignment, is an improper presentation of the evidence to the jury, under the decision of this court in Hickory vs. United States, recently passed upon.

The language of the court upon the subject of previous threats, referred to in the eleventh assignment, is clearly erroneous, as shown by the following decisions of this court, lately decided:

Allison vs. United States.

Thompson vs. United States.

The subject matter of the twelfth assignment, is similar to the seventh, and a further discussion is not necessary.

The fourteenth assignment relates to the question of flight as evidence against the defendant. We do not think that the question is fairly presented by the trial court. It is always the duty of the court to admonish the jury that flight is not always evidence of guilt, but may result from other feelings in the heart of the defendant. In the extract from the charge quoted in the assignment, which is all the court said upon the subject, the jury is asked, "Whether defendant has sufficiently explained the presumption which he says arises from flight," &c. We

do not understand that there is necessarily a presumption of guilt arising from flight.

Mr. Wharton, in his work on "Criminal Evidence," (ninth edition), Section 750, in discussing this subject, says:

"But it must be remembered that while these acts are indicative of fear, they may spring from causes very different from that of conscious guilt. Many men are naturally of weak nerve, and under certain circumstances, the most innocent person may deem a trial too great a risk to encounter. He may be aware that a number of suspicious, though inclusive facts, will be adduced in evidence against him; he may be assured that powerful or wealthy individuals have resolved on his ruin, or that witnesses have been suborned to bear false testimony against him; he may feel his inability to procure legal advice to conduct his defense, or to bring witnesses from a distance to establish it; add to all this, more or less vexation must necessarily be experienced by all who are made the subject of criminal charges, which vexation it may have been the object of the party to elude by concealment, with the intention of surrendering himself into the hands of justice when the time for trial should arrive. The question, it cannot be too often repeated, is simply one of inductive probable reasoning from certain established facts. All courts can do, when such inferences are invoked, is to say that escape, disguise, and similar acts afford, in connection with other proof, the basis from

which guilt may be inferred; BUT THIS SHOULD BE QUALIFIED BY A GENERAL STATEMENT OF THE COUNTERVAILING CONSIDERATIONS INCIDENTAL TO A COMPREHENSIVE VIEW OF THE QUESTION."

In Hickory vs. United States, recenty decided in this court, Mr. Justice White enters into a thorough discussion of the duty of a trial court, in charging upon the question of flight as evidence against accused. The rules laid down by Justice White, are not followed in the language quoted in this assignment.

The fifteenth assignment refers to language in the trial court as to presumption of innocence existing in favor of the accused in all criminal trials. We do not believe that the law upon the subject was correctly given. See—

Coffin vs. United States, 156 U. S. 432.

The foregoing is respecsfully submitted.

WM. M. CRAVENS.

Attorney for Plaintiff in Error.

FILED
MAR 2 1896
JAMES H. MCKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

ED. ALBERTY, ALIAS CHARLES BURNS, plaintiff in error,
v.
THE UNITED STATES.

No. 832.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

ED. ALBERTY, ALIAS CHARLES BURNS, plaintiff in error,
v.
THE UNITED STATES.

No. 853.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

Plaintiff in error, a Cherokee negro, who was known either by his father's name, Burns, or his former master's name, Alberty, was indicted on August 26, 1895, and tried November 13, 1895, before Judge Parker and a jury, for the murder of one Phil Duncan at the Cherokee Nation, in the Indian Territory. The indictment alleged the crime to have been committed May 15, 1879, but it appeared by the evidence to have been committed in 1880 (pp. 8, 57).

The charge of the court appears to contain at least one clear error in its discussion of the inferences from flight.

Jurisdictional questions, however, are presented, upon which it is respectfully submitted that a decision should be reached. Otherwise, if it shall eventually be found that the Federal courts had no jurisdiction over this crime, unnecessary expense to the Government and unnecessary harassment to the prisoner may result; while it is important to know the exact scope of the Cherokee treaty in limiting the jurisdiction of the Federal courts. A similar request was made on behalf of the Government in *Cook* v. *United States* (138 U. S., 157).

JURISDICTION OF THE COURT.

It is undisputed that Alberty, at the time when the crime was committed, was a citizen of the Cherokee Nation. He was a negro, born in slavery and freed by act of the National Council in February, 1863 (14 Stat., 801). He became a Cherokee citizen by virtue of Article IX of the treaty of 1866 (14 Stat., 801):

> They further agree that all freedmen who have been liberated by voluntary act of their former owners, or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees.

It is a fair implication from defendant's testimony (p. 38), and is undisputed in any way, that he returned home with his master at the close of the rebellion and is entitled to the benefit of the above-named provisions.

Phil Duncan, the murdered man, was the son of a Choctaw Indian by a colored woman who was not his

wife, but was at that time a slave in the Choctaw Nation (p. 28). Duncan came to the Cherokee Nation when he was about 17 years old, married a Cherokee citizen, and is stated to have become, himself, a citizen of that nation. This all appears by the prosecution's testimony (pp. 27-31). Alberty's counsel, however, concede in their brief that he was not a Cherokee citizen, claiming him to be a Choctaw.

The jurisdiction of Judge Parker's court over the Indian Territory in murder cases arises from the following statutory provisions:

> Except as to crimes, the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. (Rev. Stat., § 2145.) The preceding section shall not be construed to extend to *crimes committed by one Indian against the person or property of another Indian*, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, *or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.* (§ 2146.)

Alberty is a negro. Duncan was the illegitimate son of a negro female slave, and therefore is also to be counted as a negro. (*Williamson* v. *Daniel*, 12 Wheat., 568; *Fowler* v. *Merrill*, 11 How., 375.) Neither of them, therefore, is an Indian within the meaning of the first clause of § 2146, which is taken from the act of June 30, 1834,

ch. 161, § 25. (*United States* v. *Rogers*, 4 How., 567, 573; *Westmoreland* v. *United States*, 155 U. S., 545, 558.) The word "Indian" in the second clause would seem to have a similar meaning; nor is Alberty claimed to have been punished by the local law of his tribe.

It remains to consider whether this is an offense the exclusive jurisdiction over which is secured to the Cherokee tribe by treaty.

The Cherokee treaty of July 19, 1866, Art. XIII (14 Stat., 799, 803), provides for the establishment of a court or courts by the United States in the Cherokee Territory.

> With such jurisdiction and organized in such manner as may be prescribed by law: *Provided*, That the judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all *civil and criminal cases* arising within their country *in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation*, except as otherwise provided in this treaty.

The exceptions here referred to relate to the so-called Canadian District (Laws of the Cherokee Nation, ed. 1892, p. 230) and to the country northwest of Grand River. (Treaty of 1866, Art. IV, VII.) The present case is not within these exceptions.

The Oklahoma act of May 29, 1890, ch. 182, § 30, provides:

> That the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in "the country" *in which members of the nation, by nativity or by adoption, shall be the only parties.*

§ 31 of the same act provides as follows:

> The Constitution of the United States and all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States, except in the District of Columbia, and all laws relating to national banking associations, shall have the same force and effect in the Indian Territory as elsewhere in the United States; *but nothing in this act shall be so construed as to deprive any courts of the civilized nations* of exclusive jurisdiction over all cases arising *wherein members of said nations, whether by treaty, blood, or adoption, are the sole parties*, nor so as to interfere with the right and power of said civilized nations to punish said members for violations of the statutes and laws enacted by their national councils where such laws are not contrary to the treaties and laws of the United States.

This court, in the case entitled *In re Mayfield*, 141 U. S., 107, 114, has held that in a criminal case the defendant is the only party within the meaning of the Cherokee treaty, saying, by Mr. Justice Brown (p. 116):

> As Mayfield was a member of the Cherokee Nation by adoption, if not by nativity, *and was the sole party to these proceedings*, we think it is clear that under the treaties and acts of Congress he is amenable only to the courts of the nation.

The United States, therefore, is not regarded as a party within the meaning of the treaty, notwithstanding the principle of *Coffey* v. *United States*, 116 U. S., 436, 445.

Mayfield was prosecuted for adultery, a crime not recognized in the Cherokee laws, and nevertheless was released. Homicide, however, is very fully provided for

by the laws of the Cherokee Nation. (Laws of the Cherokee Nation, ed. 1892, pp. 159–164.)

These laws also provide very fully for the rights of persons who have become citizens by adoption and intermarriage. (*Id.*, pp. 329-334, 370-73.)

While the Cherokee treaty has not been appealed to by defendant's counsel, nevertheless, as this court ruled in *Famous Smith* v. *United States*, 151 U. S., 50, after full argument, that jurisdictional questions could be raised here in criminal cases which were not raised by any exception on the trial or by the record, the court's attention is now directed to the subject.

If the Mayfield case is to be extended so as to apply to murders of white men by Indians, the position of white men in the Cherokee country will become very serious.

In view of the concession made in the brief for plaintiff in error, that the deceased was a Choctaw citizen, the question seems to come up here very clearly for decision, since the treaty does not reserve jurisdiction to the native courts in such a case, while, as above pointed out, a negro is not within the earlier clauses of the statute.

The questions here presented were presented in the Famous Smith case, but not decided by the court.

ASSIGNMENTS OF ERROR.

I–III. The first three assignments of error relate to questions raised by the first two exceptions to the charge of the court. They relate to the jurisdiction of the court, and are immaterial if defendant is within the terms of the Cherokee treaty. There can be no doubt

that the trial judge was correct in ruling that the deceased would follow the status of his slave mother; while under the provisions of the Chickasaw and Choctaw treaty it would appear that this freedman, Phil Duncan, had become a citizen of the United States before he became a citizen of any Indian tribe (treaty of April 28, 1866, Art. III, 14 Stat., 770), since it would appear from the language of the learned judge that no law was passed by the Choctaw Nation within two years after the treaty, conferring citizenship of that nation upon freedmen.

IV–VII. None of these charges seem to contain matter prejudicial to the prisoner, especially in view of the facts of this case.

According to the prosecution's testimony, the homicide was committed without provocation; and either was a deliberate murder, growing out of jealousy about defendant's wife, or was committed under some misapprehension (pp. 7, 20–22, 27, 37). According to defendant's testimony, Duncan was a rough character who had previously threatened him and twice shot at him. Defendant claims to have rather liked him, nevertheless, and to have disbelieved the stories told about his relations with Mrs. Alberty. Defendant claims to have shot in self-defence. According to his story, they had met in the yard of a Mr. Lipe and began to quarrel, when Mr. Lipe ordered them out of the yard. Defendant says (p. 40):

> I started to move, and this fellow says to me, he says, "I will kill you, God damn you;" and made for me. He was between me and the house, and I

> was next to the gate, and I broke for the gate to try to get out of his way, and as I broke for the gate he was coming at me; seemed like he was going to cut me with something, I couldn't tell what it was, and I threw myself right around, that way [illustrating], and fired.

The learned judge considers it necessary to discuss the degree of care necessary when "handling a dangerous agency." There is no claim that defendant handled the pistol, which was the "dangerous agency" in the present case, with any other purpose than that of killing or disabling his pursuer. It is difficult to perceive why the doctrine of "reasonable care" is interjected into the present case, unless it is for the reason stated in the learned judge's opinion filed after the first trial of the Hickory case and found in the record of that case as first presented to this court, namely:

> Now, it is said that the charge is abstract. That means, of course, legally speaking, that it asserts principles that have no relevancy to the case. That is what abstract means. A concrete principle of the law is a principle that is relevant to the case. * * * The practice has grown up here of the court giving to the jury every principle that is invoked, whether that principle is an abstract principle or not, or whether it may turn out to be abstract. That is a question left to them for determination.

It is respectfully submitted that no prejudicial error is here to be found, although it is difficult to perceive why the jury should have been troubled with the doctrine. The same may be said of the ancient illustration of "an ordinary fist and skull fight" when dealing with the sub-

ject of manslaughter. The illustration is mediæval in its origin and has no value in modern times, but can have had no influence on the present case one way or the other. Part of the matter contained in the sixth assignment of error seems to have been carefully prepared to avoid the ruling of this court in *Gourko* v. *United States*, 153 U. S., 183, and *Thompson* v. *United States*, 155 U. S., 271. It is difficult to perceive why the learned judge so persistently introduces this subject, but it is respectfully submitted that he has succeeded in avoiding those cases, and that his remarks do no harm.

VIII. This charge upon self-defence introduces the familiar proviso discussed by this court in *Bobe Beard* v. *United States*, 158 U. S., 550, that defendant, before defending himself, must "use all the means in his power otherwise to save his own life, * * * such as retreating as far as he could or disabling his adversary without killing him." For the inclusion of these words in other charges, error has recently been confessed in three cases. It is questionable whether the error is fatal in the present case. In previous cases the attack was made with firearms, so that the doctrine of retreat was clearly inapplicable. In the present case defendant does not claim that his adversary had anything worse than a knife. They were both trespassing in a neighbor's yard, and by defendant's own story there seems no reason why he should not have done his best to run away before shooting. Indeed, he substantially admits this, and claims that he did begin to run away, but was afraid that he was not able to run fast enough.

IX. The first part of this assignment of error is a quotation, by way of illustration, from another case (p. 70). Such illustrations, while justly subject of criticism, are not error. (*Pointer* v. *United States*, 151 U. S., 396, 416.) The judge's comments on this illustration have no relation to the defence of the present case, but seem otherwise unobjectionable.

X. This assignment relates to an instruction that the jury should "take into consideration the case with which it may be stated that previous threats had been made when the author of them * * * is in his grave." This is not, like the language in *Hickory* v. *United States*, 160 U. S., 408, a direct reflection upon testimony of the prisoner. Threats were testified to by one of the other witnesses (p. 47).

XI. This relates to a charge as to the threats made by deceased and communicated to the prisoner. The learned judge says:

> If * * * he broods over them and forms a design to kill because of these threats, * * * that is evidence of malice aforethought, because it would show premeditation; it would show that the design to kill was thought of beforehand, was contemplated beforehand.

This is part of a discussion of threats at pages 70–73 of the record. It may be considered objectionable under *Thompson* v. *United States*, 155 U. S., 271, 281, and *Allison* v. *United States*, 160 U. S., 203, 213–216; but it would seem to avoid the objectionable features which

were criticised in those cases. The learned judge does not charge here that the threats are evidence of "ill will and hostility," as in the Thompson case, or of "spite or ill will or grudge," as in the Allison case. He charges simply, as bearing upon the question of motive, that if a desire to get rid of a person who had threatened his life was the reason for the homicide, it was not a sufficient reason; but that a design to rid one's self of such a danger in such a manner is malice aforethought.

XII, XIII. These assignments seem to require no comment.

XIV. This charge relates to the flight of defendant. The crime was committed in 1880, and a day or two later defendant fled from the jurisdiction of the court. He went to St. Louis and there resumed his father's name instead of that of his master, which he had previously borne. Defendant gave his reason for fleeing as follows:

> My heart was broke, and I just didn't care to stay. I thought I would just go away from the country where I would never hear from my people any more, because my heart was broke, and my children was all young, and they had just commenced to love me, and my heart was broke at that time, and that is the reason I went away [p. —].

The learned judge charged, among other things (pp. 77–8):

> You are to pass upon the question as to *whether or not he has sufficiently explained away the presumption which the law says arises from flight* when a man has taken human life.

Quoting the scriptural adage, "The wicked flee," etc., he adds:

> Men who are conscious of right have nothing to fear. They do not hesitate to confront a jury *of their country*, because that jury will protect them.

It is not perceived what relevance this has to the case of a Cherokee citizen who fears that he will be brought before a jury of another country, with no fellow-citizens upon it.

The judge further charges:

> When a man flees, the fact that he does so *may be* taken against him, *provided he does not explain it away* upon some other theory than that of his flight because of his guilt. A man accused of crime hides himself and then absconds. From this fact of absconding we may infer the fact of guilt. This is *a presumption of fact or an argument of a fact from a fact.*

He does not, however, explain to the jury the difference between a presumption of fact and a presumption of law.

He further charges:

> *It is in some sense*, feeble or strong, as the case may be, *a confession.* * * * *Now, that is the figure that flight cuts in a case. It is a question in this case whether this defendant has sufficiently explained it here to take away the effect of the presumption arising from flight.*

The undersigned is unable to distinguish the present case from that of *Hickory* v. *United States*, 160 U. S., 408.

XV. It is not easy to perceive what defendant's complaint is against this instruction.

Respectfully submitted.

EDWARD B. WHITNEY,
Assistant Attorney General.

Office Supreme Court U. S.
FILED.
MAR 28 1896
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

ED. ALBERTY, ALIAS CHARLES BURNS, plaintiff in error,
v.
THE UNITED STATES.
No. 853.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

SUPPLEMENT TO BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

ED. ALBERTY, ALIAS CHARLES BURNS, plaintiff in error, v. THE UNITED STATES.	No. 853.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

SUPPLEMENT TO BRIEF FOR DEFENDANT IN ERROR.

Since filing the main brief for defendant in error, the United States attorney for the western district of Arkansas has called the attention of the undersigned to an incorrect statement of fact therein, namely, the statement on page 3 that the murdered man Duncan "is stated to have become himself a citizen of" the Cherokee Nation. Duncan having been apparently a citizen of the United States (Brief, p. 7), and having married a citizen of the Cherokee Nation, where he had resided from early youth,

it was assumed by the undersigned that he had become a Cherokee citizen according to the Indian system of adoption by intermarriage.

The district attorney, however, states that the provisions of law with relation to formalities of intermarriage (Laws of the Cherokee Nation, 1875, p. 221) are very strictly enforced, and that citizenship by marriage is not recognized except after proof of these formalities.

Furthermore, he states that by the settled construction given to these laws no rights of citizenship can be acquired in the Cherokee Nation by intermarriage with a freedwoman, although the latter be herself a citizen of the nation. In other words, the phrases "Cherokee woman" and "Cherokee wife or husband" in the intermarriage act (id., pp. 221–223) refer to Cherokees by blood only.

The Cherokee Nation has a regular system of courts (*Mehlin* v. *Ice*, 56 Fed. Rep., 12), and the construction which the nation gives to its own laws should be controlling when these laws are not opposed to the Constitution or laws of the United States or treaties made therewith. The Fourteenth Amendment does not apply to freedmen in the Cherokee Nation, and Article IX of the Cherokee treaty (14 Stat., 801), while it gives to them "all the rights of native Cherokees," does not force the nation to adopt any other negroes simply on account of their intermarriage with these people. In support of his argument, the district attorney submits letters from the Principal Chief and the Attorney General of the Cherokee Nation, which are annexed hereto as Appendices A and B. The

decision of Indian Commissioner Atkins, referred to in the Attorney General's letter, is annexed hereto as Appendix C.

On the question whether jurisdiction exists, assuming Duncan to have been a citizen of the United States, the district attorney makes the following observations upon the case *In re Mayfield* (141 U. S., 107), to which the attention of the court is asked:

> In referring to the Mayfield case, on page 5 of your brief, you state that the Supreme Court has held that in a criminal case the defendant is the only party within the meaning of the Cherokee treaty. The language used by the Supreme Court in that case is as follows:
>
> "As Mayfield was a member of the Cherokee Nation by adoption, if not nativity, and was the sole party to *these proceedings*"—that is, to the act of adultery—"we think it is clear," etc.
>
> I have always believed that the court in this case only intended to hold that in crimes like adultery where there was no adverse or injured party that this court had no jurisdiction. You will observe that Mr. Justice Brown, in discussing this case, on page 113, and in describing the offense, uses this language:
>
> "It does not appear, however, who was the prosecutor, or in fact that there was anyone who could properly be so termed. *The party with whom the adultery* is claimed to have been committed is not an *adverse party* but a consenting party."
>
> There are many crimes committed where there can be said to be no injured party. They are committed against the peace and dignity of the State or the good morals of the community—such

as drunkenness, lewd and lascivious conduct, selling whisky without license, adultery, and many others. In these there can be no adverse parties. They are rightly distinguished from such crimes as larceny, assault with intent to kill, manslaughter, and murder. In this latter class of crimes there is a criminal, and the party injured, or the prosecutor. As to this latter class of crimes it has always been the policy of the United States to reserve to its courts jurisdiction over them in the Indian country where one party was an Indian and the other not an Indian. The reason for this is clearly stated in the Mayfield case, page 116, where the court uses this language:

"The general object of these statutes is to vest in the courts of the nation jurisdiction of all controversies between Indians, or where a member of the nation is the only party to the proceeding, and to reserve to the courts of the United States jurisdiction of all actions to which its own citizens are parties on either side."

The court here clearly recognizes and asserts the idea that in criminal cases there may be two parties, the one an Indian and the other its own citizen.

Respectfully submitted.

EDWARD B. WHITNEY,
Assistant Attorney General.

APPENDIX A.

EXECUTIVE DEPARTMENT,
CHEROKEE NATION,
Tahlequah, Ind. T., March 12, 1896.

It is hereby certified that marriage between Cherokee freedmen, citizens of this nation, and a negro or other citizen of the United States does not confer or is intended to confer, under the laws of this nation, any of the rights of citizenship upon the citizen of the United States; that the only right permitted such intermarriage is that of residence and the holding of personal property; that the courts of this nation have not claimed nor do claim any jurisdiction over them either in civil or criminal suits at law; that they are not permitted to vote in any of the elections of the country, and that in cases of contested elections the votes of such persons are declared illegal and are thrown out; that the law of intermarriage between Cherokees, Delawares, and Shawnees, citizens of this nation, and citizens of the United States, does not, nor is intended to, apply to freedmen citizens of this nation, and that the above is a correct statement of the understood condition or status of the Cherokee freedman of this nation.

Given under my hand and the seal of the Cherokee nation this the date first above written.

[Seal of the Cherokee Nation.] S. H. MAYES,
Principal Chief.

APPENDIX B.

OFFICE ATTORNEY-GENERAL
CHEROKEE NATION,
Tahlequah, Ind. T., March 12, 1896.

JAMES F. READ,
United States District Attorney.

SIR: Your communication of 9th instant to John L. Adair, executive secretary, has been referred to me for an opinion in regard to the contents therein set forth. In the first place, the Cherokee Nation has no statutory provisions directly controlling this matter of marriage between Cherokee freedmen and colored persons of the States. The Cherokee freedmen are here by virtue of the ninth article of the treaty of 1866, with all the accruing rights recently determined by the courts of the United States at Washington. The Cherokee Nation has always held that these persons could not by intermarriage confer these rights upon any other colored person not a Cherokee citizen. In the case of white adopted citizens there is statutory law governing this matter, that is, that a white woman or man marrying another white man or woman forfeits his or her right to citizenship. We do not hold that the Cherokee negro marrying a State negro or citizen of the United States works a forfeiture of the rights of the Cherokee negro, but that the act of marriage does not confer the rights and privileges he possesses upon the party so married. This question was referred to Commissioner Atkins, of the Interior Department, in the year 1886, I think it was, in which decision he held that one Cherokee freedman could not confer any rights to citizenship in this nation by marrying a negro from the States. More recently, in the taking of what is known as the Wallace roll or census of Cherokee freedmen, negroes who had come from the States and intermarried with Cherokee freedmen were excluded by Mr. Wallace,

and did not participate in the $75,000 paid out by him to Cherokee freedmen subsequent to making his roll. I suppose a copy of the decision of Commissioner Atkins in regard to this matter can be obtained in the Indian Department at Washington. The Cherokee Nation does not hold that class of persons amenable to its laws, and disclaims any jurisdiction where they are the offenders or violators of her criminal code. I think this view of the question has been universally held and practiced in the United States court at Fort Smith, and any other construction, in my opinion, would be a monstrous assault upon the rights of the Cherokee people.

Very respectfully,

R. F. WYLY,
Attorney-General Cherokee Nation.

APPENDIX C.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, December 10, 1885.

WILLIAM H. HUDSON, Esq.,
Fort Gibson, Ind. T.

SIR: Replying to your communication, dated December 2, 1885, relative to your rights in the Cherokee Nation as the husband of a Cherokee freedwoman, I have to state that there is no distinction as to race or color so far as concerns citizens of the United States marrying into the Cherokee Nation.

Section 66, Cherokee intermarriage act, provides that every white man, or citizen of the United States, or of any foreign State or Government, desiring to marry a Cherokee, Delaware, or Shawnee woman, shall be required to obtain a license, etc.

A white man and a negro marrying native Cherokees would each be entitled to the same rights in the Cherokee Nation. But there is a distinction between native Cherokees, Delawares, and Shawnees on the one hand, and adopted Cherokees and freedwomen on the other.

The first class, under the Cherokee law, confers citizenship upon the party whom they marry, while the second class do not confer citizenship by such marriage. Therefore, unless your wife be considered a native Cherokee you have gained no rights in that nation by your marriage with her, and are subject to the permit laws.

Very respectfully,

J. D. C. ATKINS,
Commissioner.